Petition

No. 81-1371

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

HOOPA VALLEY TRIBE OF INDIANS,
Petitioner,
v.
JESSIE SHORT, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether individuals claiming to be "Indians" have non-tribal ownership rights in the resources of an Indian reservation originally set aside for the resident tribe, where they are not members of the resident tribe, have never lived on the land so set aside, have never participated in tribal affairs, have as little as one-sixty-fourth Indian blood, and where the Secretary of the Interior has previously rejected their claim to ownership rights.

If individual "Indians" have such rights, the economic and political stability of scores of tribes whose reservations were of similar origin will be jeopardized by similar claims.

2. Whether the heretofore inviolate concept of tribal ownership of the unallotted lands and resources of an Indian reservation—upon which the national policy of tribal self-determination is dependent—may be abrogated by a determination of the Court of Claims divesting a sovereign tribe of its exclusive ownership and political control of its reservation, and thereby effectively abolishing the tribe.*

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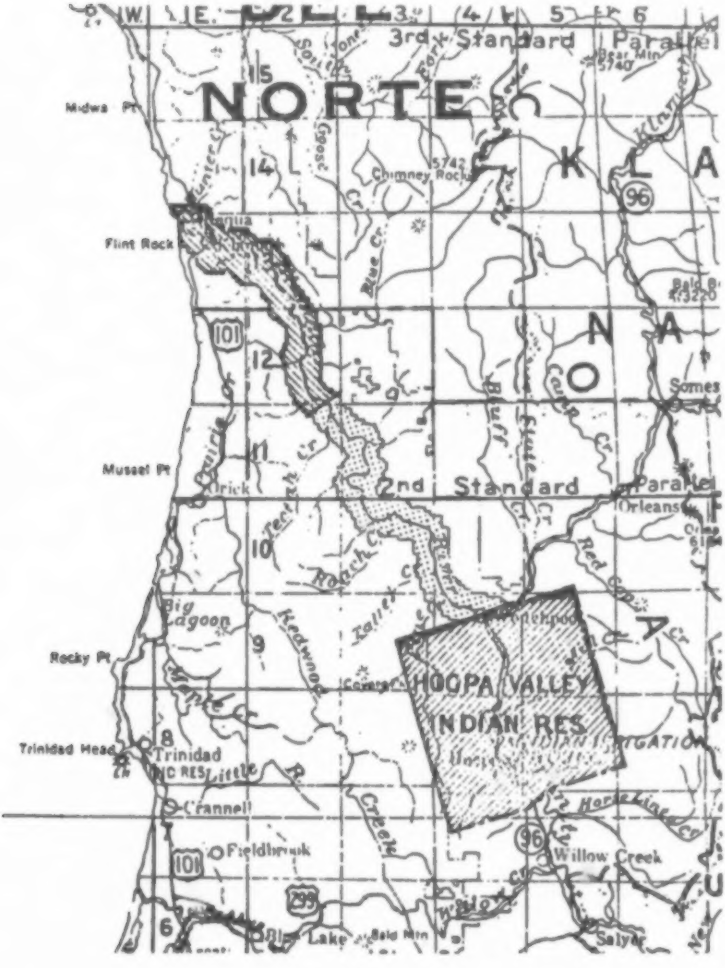
* PARTIES TO THE PROCEEDINGS BELOW: Plaintiffs in the Court of Claims (Respondents here) were Jessie Short and approximately 3,800 other individuals claiming Indian descent. Defendant below was the United States of America, and Petitioner, the Hoopa Valley Tribe of Indians, was the Defendant-Intervenor.

MAP OF HOOPA VALLEY INDIAN RESERVATION, CALIFORNIA*
Scale: 1 inch = 12 miles



LEGEND:
▨ Old Klamath River Reservation.
▒ Connecting Strip.
▨ Original Hoopa Valley Reservation.

*From Mattz v. Arnett, 412 U.S. 481, 506 (1973)

TABLE OF CONTENTS

Page

Questions Presented for Review i

Map of Hoopa Valley Reservation ii

Table of Contents iii

Table of Appendices iv

Table of Authorities v

Decision Below 1

Jurisdiction 1

Statutes and Executive Orders Involved 1

Statement of the Case 1

Reasons for Granting Writ 15

- I. THE COURT OF CLAIMS' DECISION WILL UNLAWFULLY TERMINATE THE HOOPA VALLEY TRIBE 18
- II. UNALLOTTED RESERVATION LANDS BELONG TO TRIBES, NOT TO INDIVIDUAL INDIANS 24
- III. THE COURT OF CLAIMS' DECISION THREATENS AT LEAST 68 RESERVATIONS THROUGHOUT THE UNITED STATES 26
- IV. THE COURT OF CLAIMS ARROGATED A QUESTION RESERVED TO THE POLITICAL BRANCHES 28
- V. THERE IS A CONFLICT WITH THE NINTH CIRCUIT 30

Conclusion 30

TABLE OF APPENDICES

Page

A—Opinion of Court of Claims, Sep. 23, 1981 .... A1

B—Opinion and Findings of Court of Claims, October 17, 1973 .... B1

  —Act of April 8, 1864, 13 Stat. 40 .... B16

  —Treaty or Agreement of 1864 .... B21

  —Executive Order of June 23, 1876, 1 Kapp. 815 .... B28

  —Executive Order of October 16, 1891, 1 Kapp. 815 .... B30

C—Act of June 17, 1892, 27 Stat. 52 .... C1

D—Act of May 19, 1958, 72 Stat. 121 .... D1

E—Decisions of Dept. Int., *Crichton v. Shelton*, 33 I.D. 205 (1904) E1

F—Acts, Treaties, and Executive Orders of Some Indian Reservations with Organic Language Similar to That of the Hoopa Valley Reservation F1

  Part 1. Reservations created for a class of beneficiaries which is open-ended F1

  Part 2. Reservations created for tribes some of which no longer exist as organized, federally-recognized entities F9

  Part 3. Reservations created without specifying a tribe as beneficiary F16

G—Decisions of Dept. Int., *Rights of Indians in the Hoopa Valley Reservation*, 65 I.D. 59 (1958) G1

H—Bureau of Indian Affairs, Annual Report on Indian Lands (1971) H1

TABLE OF AUTHORITIES

Cases Page

Ackley v. United States, No. 460-78 (Ct. Cl., filed October 20, 1978) 12
Apis v. United States, 88 F. 931 (S.D. Cal. 1898) .. 7
Baker v. Carr, 369 U.S. 186 (1962) 14, 29
Bryan v. Itasca County, 426 U.S. 373 (1976) 19, 23
Cabazon Band of Mission Indians v. United States, 21 Ind. Cl. Comm. 119 (1969) 7
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) 24, 28
Cherokee Nation v. Journeycake, 155 U.S. 196 (1894) 24
Cherokee Trust Funds, 117 U.S. 288 (1886) 25
Chippewa Indians of Minnesota v. United States, 88 Ct. Cl. 1, aff'd, 307 U.S. 1 (1939) 28-29
Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977) 13
Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974) 25
DeCoteau v. District Court, 420 U.S. 425 (1975) .. 20
Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) 20
Donnelly v. United States, 228 U.S. 243 (1913) 4
Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967) 24
Edelman v. Jordan, 415 U.S. 651 (1974) 24
Fisher v. District Court, 424 U.S. 382 (1976) 17, 22
Gritts v. Fisher, 224 U.S. 640 (1912) 25, 26
Halbert v. United States, 283 U.S. 753 (1931) 25
Hoopa Valley Tribe v. Short, 416 U.S. 961 (1974) .. 13
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 16
Indianapolis v. Chase Manhattan Bank, 314 U.S. 63 (1941) 16
Jones v. Meehan, 175 U.S. 1 (1899) 21
Journeycake v. Cherokee Nation, 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894) 25
Logan v. Andrus, 640 F.2d 269 (10th Cir.), *cert. denied*, Oct. 5, 1981 17
Mattz v. Arnett, 412 U.S. 481 (1973) .... *passim*

TABLE OF AUTHORITIES—Continued

Page

McCalib v. United States, 83 Ct. Cl. 79 (1936) 28
McDougal v. McKay, 237 U.S. 372 (1915) 25
Menominee Tribe v. United States, 391 U.S. 404 (1968) 19
Mercer v. Theriot, 377 U.S. 152 (1964) 16
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 23
Morton v. Mancari, 417 U.S. 535 (1974) 17
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 17, 30
Prairie Band of Potawatomi Indians v. United States, 165 F. Supp. 139, 143 Ct. Cl. 131 (1958), *cert. denied*, 359 U.S. 908 (1959) 25
Puzz v. United States Dept. of Interior, No. C-80-2908 TEH (N.D. Cal. filed July 14, 1980) 2, 18
Reece v. Georgia, 350 U.S. 85 (1955) 16
Rosebud Sioux Tribe v. Kneip, 430 U.S. 504 (1977) 20
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 17, 20, 22
Sizemore v. Brady, 235 U.S. 441 (1914) 25
Udall v. Tallman, 380 U.S. 1 (1965) 30
United States v. Carver, 260 U.S. 482 (1923) 16
United States v. Forty-Eight Pounds of Rising Star Tea, 35 F. 403 (N.D. Cal. 1888), *aff'd*, 38 F. 400 (Cir. Ct. N.D. Cal. 1889) 6, 7
United States v. Holliday, 70 U.S. 407 (1865) 29
United States v. Jim, 409 U.S. 80 (1972) 20, 25
United States v. Kagama, 118 U.S. 375 (1886) 20
United States v. Mazurie, 419 U.S. 544 (1975) 16, 17
United States v. Sandoval, 231 U.S. 28 (1913) 29
United States v. Testan, 424 U.S. 392 (1976) 24
United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939) 6
United States v. Wheeler, 435 U.S. 313 (1978) 17
United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976) 20
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 17

TABLE OF AUTHORITIES—Continued

Page

Washington v. State Fishing Vessel Ass'n, 443 U.S. 658 (1979) ... 16, 20-22
Whitefoot v. United States, 155 Ct. Cl. 127, 293 F.2d 658 (1961), *cert. denied*, 369 U.S. 818 (1962) ... 25
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1981) ... 17
Worcester v. Georgia, 31 U.S. 515 (1832) ... 20

Statutes

Act of March 3, 1853, 10 Stat. 238 ... 3
Act of April 8, 1864, 13 Stat. 39 ... 1, 4
Act of March 3, 1865, 13 Stat. 538 ... 5
Act of July 27, 1868, 15 Stat. 221 ... 5
Act of April 10, 1869, 16 Stat. 37 ... 5
Act of January 12, 1891, 26 Stat. 712 ... 8
Act of June 17, 1892, 27 Stat. 52 ... 8
Act of March 3, 1909, 25 U.S.C. § 396 ... 15
Act of May 19, 1958, 72 Stat. 121 ... 9
General Allotment Act of February 18, 1887, 25 U.S.C. §§ 331-358 ... 9, 22-23
Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq. ... 17, 22
Indian Financing Act of 1974, 25 U.S.C. §§ 1451 et seq. ... 17, 22
Indian Reorganization Act, 25 U.S.C. §§ 461 ff. ... 11, 22, 23
Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 et seq. ... 17, 22
25 U.S.C. §§ 311-328 ... 25
25 U.S.C. § 348a ... 9
25 U.S.C. §§ 396, 396a, 398, 398b ... 25
25 U.S.C. §§ 406, 407 ... 1, 15, 24
28 U.S.C. § 1255(1) ... 1

Executive Orders and Administrative Decisions

Executive Order of November 16, 1855, 1 Kappler 817 ... 3
Executive Order of June 23, 1876, 1 Kappler 815 ... 1

TABLE OF AUTHORITIES—Continued

Page

Executive Order of January 9, 1884, 1 Kappler 832 6

Executive Order of October 16, 1891, 1 Kappler 815 .... *passim*

Crichton v. Shelton, 33 I.D. 205 (1904) .... *passim*

Rights of Indians in the Hoopa Valley Reservation, 65 I.D. 59 (1958) 12, 29

Miscellaneous Authorities

Annual Report, Commissioner of Indian Affairs (1864) 4

F. Cohen, *Handbook of Federal Indian Law* (1942) 2, 24, 26

Federal and State Indian Reservations and Indian Tract Areas (U.S. Govt. Print. Off. 1974) 7-8

D. Getches, *Federal Indian Law* (1979) 27

B. Nelson, Jr., *Our Home Forever: A Hupa Tribal History* (Hupa Tribe, 1978) 3

S. Powers, Tribes of California, cc. 4 and 5, published as 3 *Contributions to North American Ethnology* (1877) 10

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

DECISIONS BELOW

Review is hereby sought of a decision of the United States Court of Claims, not yet reported; the court's slip opinion is reproduced as Appendix A to this Petition.

JURISDICTION

The decision of which review is now sought was issued on September 23, 1981. On December 10, 1981, the Chief Justice extended the time for the filing of this Petition through January 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATUTES AND EXECUTIVE ORDERS INVOLVED

Act of April 8, 1864, 13 Stat. 39, reprinted App. B 16.
Agreement ("Treaty") of 1864, reprinted App. B 21.
Executive Order of June 23, 1876, reprinted App. B 28.
Executive Order of Oct. 16, 1891, reprinted App. B 30.
Act of June 25, 1910, as amended, 25 U.S.C. §§ 406, 407.

STATEMENT OF THE CASE

A. Introduction.

The Court of Claims below held the United States accountable for its recognition of Petitioner, the Hoopa Valley Tribe, as the beneficial owner of revenue from timber of unallotted[1] land on the Hoopa Square, part of the present Hoopa Valley Reservation in California.[2] The organic documents and federal enactments creating the Hoopa Valley Reservation were construed by this Court in *Mattz v. Arnett,* 412 U.S. 481 (1973), to avoid the disestablishment of the Klamath River Reservation. Ironically, the documents held in *Mattz* to preserve one portion of the Hoopa Valley Reservation—the Klamath River Reservation—are read by the Court of Claims to signal the "termination" of the Hoopa Valley Tribe on another. The court held that these same documents and enactments prevented the Hoopa Valley Tribe from acquiring any interest in the communal lands of the Square, and instead established ownership in a huge class of non-tribal individuals. Allowed to stand, this holding would effectively eliminate the Hoopa Valley Tribe's ability to function as an Indian tribal government.[3]

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[1] Unallotted Indian reservation lands are lands which have not been surveyed, subdivided and patented to individual Indians under the General Allotment Act or one of the special allotment acts, *see generally* 25 U.S.C. §§ 331-358 and F. Cohen, *Handbook of Federal Indian Law* Ch. 11 (1942).

[2] As used herein, the "Hoopa Square" means the 12-mile-square Hoopa Reservation established in 1864. The "Klamath River Reservation" means the strip along the Klamath River, the northern half of which was established by executive order in 1855, and the southern half of which was established by executive order in 1891. The southern half of the Klamath River Reservation is also called the "Connecting Strip." *See* Map of the Hoopa Valley Reservation, *supra,* at ii. While an 1891 executive order combined these reservations into a single tract denominated the "Hoopa Valley Reservation," it is necessary in this case to distinguish among the reservations, because one of our claims is that combining the reservations did not abrogate the established rights of the respective Indian groups thereon.

28

[3] See discussion of *Puzz v. U.S. Dep't of Interior,* pending before D.C.N.D. Cal. C-80-2908 TEH, note 29 *infra.* In that case, some of the plaintiffs herein, based on the holding below, seek a declaration that the Hoopa Valley Tribe does not exist and an injunction against the continued functioning of the tribal governing body.

Petitioner is the federally recognized Indian tribe of the Hoopa Square, organized under a constitution approved by the United States, and with a tribal membership roll recognized by the United States. The Hoopa Valley Tribe sided with the United States in the proceedings before the Court of Claims.

Respondents, plaintiffs below, are some 3,800 individuals who are not enrolled members of any Indian tribe or tribal community. They are predominantly descendants of Yurok or other Klamath River Indians, groups distinct from Hoopa Valley tribal members, who concededly do not qualify as members under the federally-approved constitution of the Hoopa Valley Tribe.[4] The great bulk of them live and work in white communities, and have little interest in the Hoopa Square beyond the prospect of windfall property rights.

B. The United States Made Peace with the Hoopas and Reserved Lands for Them in 1864.

In 1848 gold was discovered on the upper Trinity River, upstream from the future Hoopa Square. During the succeeding two decades, violent cycles of misunderstandings, raids and massacres in northern California ensued.[5] To quell the violence, Congress, in 1853, approved the creation of "military reservations . . . for Indian purposes" in California, 10 Stat. 238, and pursuant to this Act, President Pierce established the Klamath River Reservation by executive order on November 16, 1855, 1 Kappler 817. The reservation was "ideally selected for the Yuroks [a Klamath River tribe]," *Mattz v. Arnett*, 412 U.S. 481, 487 (1973), but more than 25 miles away from the Hoopas and unsuitable for their way of life.[6]

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[4] Over 800 of the plaintiffs have one-eighth Indian blood or less, ranging down to as little as one-sixty-fourth.

[5] This story is poignantly described in B. Nelson, Jr., *Our Home Forever: A Hupa Tribal History* (Hupa Tribe, 1978). Generally, see affidavit of anthropologist Dr. Verne F. Ray, App. 46 to Def. and Def.-Intvnr. Joint Reply, filed 8/15/77.

In 1864, Congress authorized the President to set apart not more than four tracts of land in California as Indian reservations, 13 Stat. 39, *see* App. B 16-17. That same year, pursuant to the Act, Austin Wiley, newly appointed Superintendent of Indian Affairs for California, commenced negotiations with the Hoopas. He met them "with their guns still in their hands" at "[t]he headquarters for the Indians who have been engaged in the war in that portion of the State for five years past . . . Hoopa valley, on the Trinity River."[7]

On or about August 16, 1864, Wiley made an agreement with the Hoopas and their allied tribes denominated a "*Treaty of peace and friendship Between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians*," under which the Hoopas promised to cooperate with the United States against the remaining hostile Indians. They laid down their arms, and agreed not to leave the land reserved to them without a written pass. The United States "agree[d] and obligate[d] itself" to establish as a reservation,

> "for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of

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[6] The Hoopa Indians were a mountain and stream people who settled in the mountains—the Coast Range of California—and developed an economic pattern that was conspicuously well adapted to their habitat. Although stream fishermen, they also depended heavily upon the mountainsides for their subsistence, obtained through hunting game and gathering of roots, vegetables, berries and nuts. Their orientation was to their mountains and their river, the Trinity River. *See* Ray Affidavit, *supra* note 5.

[7] *Annual Report*, Commissioner of Indian Affairs (1864), quoted at length in App. B 19-22. *See also Donnelly v. United States*, 228 U.S. 243, 257 (1913).

> Hoopa Valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes."[9]

The Hoopa Reservation and the 1864 Agreement were approved by the Commissioner of Indian Affairs on October 3, 1864. App. B 22-23. The Agreement was not intended to be ratified by the Senate as an Indian treaty,[10] but both parties fully performed it and peace was obtained with the Hoopas' cooperation. Congress implicitly ratified it by appropriating the necessary sums to compensate settlers for improvements in Hoopa Valley, 13 Stat. 538, and by appropriating money for the reservation in 1868 and 1869, 15 Stat. 221, 16 Stat. 37; *see Crichton v. Shelton*, 33 I.D. 205, 209 (1904), App. E 9.

By public notice, Wiley announced that the "treaty stipulations were 'confirmed' on February 8, 1865." App. B 23-24. Pursuant to the Agreement, the Square was laid out, 12 miles on a side. The Hoopa Tribe and its allied tribes, not including the Yurok Tribe or other Klamath River groups, occupied the Square, *see id.* 27-28, 69.

On June 23, 1876, the President ratified the Agreement by Executive Order. *See* App. B 28-29. The Executive Order described the area set aside by Wiley and declared it to be

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[9] App. B 21. The Trial Commissioner deduced that the Yuroks were parties to this treaty, although they were not mentioned in the treaty, because they, like the Hoopas, were then at war with the U.S., App. B 24. There is no evidence of whose names were affixed to the treaty, but it is conceded that the Yuroks were entitled to the benefit of the Hoopa Valley Reservation, provided they "availed themselves" of it, *i.e.*, moved there. Few did, but those who did have been absorbed into the Hoopa Tribe.

[10] As the Commissioner of Indian Affairs noted in 1864: "The relations of the government of the United States to the Indians of California do not contemplate treaties with those Indians, to be submitted by the President to the Senate for confirmation; but . . . it is deemed advisable to have the chiefs and leading men of the tribes in question subscribe their hands to *a document which shall fully commit them hereafter*." App. B 23 (emphasis added).

> "withdrawn from public sale, and set aside for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by Act of Congress approved April 8, 1864."

Id.[11]

C. The United States Changed the Boundaries of the Hoopa Square Solely to Preserve the Klamath River Reservation.

In the 1880's, questions arose about the legal status of the 1855 Klamath River Reservation. The good faith efforts of United States officials to preserve the Klamath River Reservation have, ironically, become the linchpin of the plaintiffs' argument to take away the Hoopa Valley Tribe's interest in the Square.

As noted, Congress instructed the President in 1864 to set aside not more than four tracts of land for Indian reservations in California, and these could include preexisting reservations. App. B 16. In 1888, a federal court ruled that the Klamath River Reservation was no longer a valid Indian reservation because it would be a fifth (actually sixth[12]) reservation. *United States v. Forty-Eight Pounds of Rising Star Tea,* 35 F. 403 (N.D. Cal. 1888), *aff'd,* 38 F. 400 (Cir. Ct. N.D. Cal. 1889). Bills to abolish the Reservation were pending in Congress, *see Mattz v. Arnett,* 412 U.S. at 499-504.

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[11] This method of initially creating Indian reservations through the acts of subordinate officials is by no means unique, *see* cases collected in *United States v. Walker River Irrigation District,* 104 F.2d 334, 338 (9th Cir. 1939) and *Crichton v. Shelton,* 33 I.D. 205, 213 (1904), App. E 17-18.

[12] The Circuit Court overlooked the Yuma Reservation set aside by Executive Order of January 9, 1884, 1 Kappler 832, as did the Court of Claims herein in 1973.

But the President believed that the Yuroks and other Klamath River Indians needed their reservation and should not be moved to another reservation because of intertribal enmity, cultural divisions and language differences.[13] Counsel for the Department of Interior suggested the solution (*see* App. B 46-49): Section 2 of the 1864 Act allowed the President to include any existing reservation within the four authorized tracts, and also authorized limitless enlargement of such reservations. The Klamath River Reservation was separated from the Hoopa Square by 25 miles of deep river canyon, along which lived many Klamath River Indians unprotected by any reservation. Extending the limits of the Square to include the Klamath River Reservation would make one, albeit gerrymandered, tract. Thus, the Klamath River Indians could retain their reservation, and it would be safe from the litigants who had persuaded a federal district court that the four-tract limit of the 1864 Act was still law.[14]

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[13] The Klamath River Indians heavily relied upon netting salmon runs in their river. Even when forced by floods to move from the area, they quickly returned to their reservation and their fisheries. *Crichton v. Shelton*, *supra*, 33 I.D. at 216, App. E22; *see* App. B15-16.

[14] The four-tract limitation of the 1864 Act had previously been construed by five Presidents as allowing the setting aside, by Executive Orders, of some 22 separate tracts as "reservations" for the various bands of Mission Indians in the 1870's and 1880's. *See* 1 Kappler 819-24. While treated administratively as a single "Mission Reservation," the 22 separate parcels were—and still are—held separately for the respective bands of Mission Indians. *Crichton v. Shelton*, *supra*, 33 I.D. at 209-10, App. E 10. The transitory nature of the four-tract limitation is thus demonstrated by the fact that, while each band obtained substantive rights in its own reserve, *see* *Cabazon Band of Mission Indians v. United States*, 21 Ind. Cl. Comm. 119 (1969); *Apis v. United States*, 88 F. 931 (S.D. Cal. 1898), those tracts were classified as "one reservation" for administrative purposes, *see* *Mattz v. Arnett*, *supra*, 412 U.S. at 493 n.15; *United States v. Forty-Eight Pounds of Rising Star Tea*, *supra*, 35 F. at 405; *cf.* App. B at 46-49.

Although the 1864 Act has never been repealed expressly, the recent publication *Federal and State Indian Reservations and*

Bowing to the "expedient" solution suggested to him, App. B 46, the President redrew the boundaries of the original Hoopa Square, extending it down the Klamath River until it encompassed the Klamath River Reservation and the strip in between.[15] The President called the new grouping "The Hoopa Valley Reservation" in deference to the four-tract provision of the 1864 Act. No intent to divest the rights of the Hoopa Valley Tribe in favor of those of individual Indians appears from any of the contemporaneous documents and circumstances.

D. Congress and the Executive's Separate Treatment of the Three Parcels Now Grouped Together as the Hoopa Valley Reservation.

Less than a year after the 1891 Executive Order enlarged the Klamath River Reservation and annexed it to the Hoopa Square, Congress authorized allotment of the Klamath River Reservation to resident Klamath River Indians. Hoopa tribal members resident on the Square were ineligible.[16] Pursuant to the Act, some 161 allotments—averaging 60 acres apiece and including valuable redwood timber—were made to resident Indians. The Act also directed the sale of land not needed for allotments, and exclusive use of all sale proceeds "for the maintenance and education of the Indians now residing

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Indian Tract Areas (U.S. Govt. Print. Off. 1974) lists no fewer than *76* Indian reservations in California.

Indeed, by the time the Hoopa Valley Reservation was administratively extended by the 1891 Executive Order, Congress itself had implicitly repealed the four-tract limitation. *See, e.g.*, Act of January 12, 1891, 26 Stat. 712 (Mission Relief Act) (authorizing creation of as many reservations as necessary to accommodate Mission Indians of California).

[15] The Executive Order is reprinted in full at App. B 30, and see map of Hoopa Valley Reservation, *supra*, p. ii.

[16] *See* App. B 53-55; Act of June 17, 1892, 27 Stat. 52, App. C 1.

on said lands and their children" (*viz.*, the Klamath River Indians). See *Crichton v. Shelton, supra*, 33 I.D. at 207, App. E 5. Then and ever since the United States has continually treated the Klamath River Reservation separately from the Square.[17]

In 1892, President Harrison, acting pursuant to the General Allotment Act, 25 U.S.C. §§ 331-358, authorized the allotment of lands on the 1891 Klamath River Connecting Strip "to the Indians located thereon," App. B 55, and in 1898 that was implemented. Some 499 allotments, averaging 40 acres apiece, including valuable timber, were made to resident Klamath River Indians. App. B 58.

Members of the Hoopa Valley Tribe were not allowed to participate in the valuable timbered allotments of the Klamath River Reservation. The Hoopa Square was not allotted until 1922 and 1923, when about 3,000 acres were allotted in small tillable parcels averaging 8 acres apiece. App. B 61. The balance of the Square, heavily timbered and of considerable religious significance to the Hoopa Tribe, was "retained as tribal land" pursuant to Indian Office and Forest Service recommendations. *Id.* This tribal land, with its now-valuable Douglas fir, is the prize sought by the plaintiffs below.

The rescue of the Klamath River Reservation had no effect on the functioning of the Hoopa Valley Tribe. The rugged mountains and deep canyons completely insulated the Hoopas from the Klamath River Indians.[18]

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[17] In 1934, the Department of the Interior ordered allotment on the Klamath River Reservation halted, App. B 94. In 1942, Congress specially extended the trust period for allotted land on the Klamath River Reservation, 25 U.S.C. § 348a. In 1958, Congress restored the remaining unallotted lands on the Klamath River Reservation, about 160 acres, to tribal ownership to be held in trust by the United States for the Klamath River Tribe. 72 Stat. 121, App. D 1; *see Crichton v. Shelton, supra*, 33 I.D. at 219, App. E 27-29.

[18] Although the Trinity River, passing through the Square, joins the Klamath River which flows through the Klamath River Reservation to the sea, the rapids are treacherous, and the canyon walls

The Hoopa aboriginal tribal organization included a tribal code of laws, a strong sense of unity, and what Powers, in 1877, called "their statecraft." *See* S. Powers, Tribes of California, cc. 4 and 5, published as 3 *Contributions to North American Ethnology* 72 (1877). In 1915 and 1916 a Hoopa tribal council, comprising exclusively Indians on the Square, was convoked by the BIA to advise on eligibility for allotments on the Square. App. B 59.[19]

In 1933, the Indians of the Square petitioned the Bureau of Indian Affairs to be allowed to organize a "tribal council", App. B 80-82. With a constitution approved by the United States in 1933 and recognized by other local governments, this became the Tribal Council of the present Hoopa Valley Tribe, which has functioned continuously to the present day as the sole government of the Square.[20] The Tribe's constitutions have always limited the Tribe's

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steep. Even today, no road runs from the Hoopa Square through the Klamath River Reservation to the sea.

The Hoopas gradually absorbed their allies, the Redwood and other groups who had joined with them in the 1864 Agreement. While the Hoopa Valley Tribe expanded to include all persons with close ties to the Square, the historic Hoopa Tribe remained the dominant tribe. App. B 69, 90-92; *see* Ray Affidavit, note 5 *supra*, at 3-6, 16.

[19] The Indian Office recognized decisions of this council. When presented with the application of James McDonald, an Indian who had lived on the Klamath River Reservation for some years, the council rejected his application. This rejection was upheld by the Indian Office because: "McDonald was 'never enrolled and recognized as a member of any of the tribes receiving benefits on the Hoopa Valley Reservation, nor did he ever maintain tribal relations therewith.'" App. B 67-71. Thus, the Indian Office recognized that residency and tribal relations with the Klamath River Indians on this reservation conferred no rights on the Square. *See also* App. B 60.

[20] See affidavit of Ray Robert Baldy, dated June 2, 1977, App. 44 to Def. and Def. Intvnr. Joint Reply (filed Aug. 15, 1977). The Interior Department approved an amended constitution and tribal roll in 1952, App. B 90, and it approved still another amendment in 1972.

territory and jurisdiction to the Hoopa Square alone. *See* App. B 78-82, 88, 90-91.

In 1934, pursuant to the Indian Reorganization Act provision giving the electors on each reservation the choice whether the IRA should apply to their reservation, 25 U.S.C. 478, the Commissioner of Indian Affairs directed that one election be held for the Hoopa Square and another for the Klamath River Reservation, App. B 66. Both groups rejected application of the IRA to their lands. *Id.*

Beginning in 1955, the Secretary of the Interior distributed portions of the income from the Hoopa Square as directed by resolutions of the Hoopa Valley Tribe. Some income has been used by the Tribe for governmental purposes, and some income has been paid to tribal members. Apart from restricted grant funds, the tribal budgets reveal that the proceeds of timber sales on unallotted lands have constituted 85 percent or more of the total revenue sources of the Hoopa Valley Tribe in recent years.[21]

In 1958, consistent with the pattern of separate legislative and administrative treatment of the Hoopa and Klamath River reservations, the Department of the Interior ruled that the unallotted resources of the Hoopa Square belong exclusively to the Hoopa Valley Tribe:

> "We read nothing in the Executive Order of 1891 to show an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation [Square].
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> * * * *
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> ". . . Each and every individual member of the many tribes or bands of California Indians was privileged after 1865 to settle upon this reservation. None of them was required to do so. Those who accepted became vested with the full incidents of

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[21] *See* App. B 96-97; Defendant's Response to Order for an Accounting (filed July 6, 1976).

> Indian title. Those who did not accept, and chose to remain where they were, or move elsewhere, cannot be properly regarded as being invested with enforceable rights thereon either in themselves or in their posterity."

Rights of Indians in the Hoopa Valley Reservation, 65 I.D. 59, 64-65 (1958), App. G 9-10. At the same time, of course, the United States continued to recognize separate rights in the people inhabiting the Klamath River Reservation.

E. Proceedings in the Court of Claims.

In 1963, over 2,000 people, most claiming to be descendents of pre-1900 Klamath River Indians, sued in the Court of Claims for a right to share in the Hoopa Square timber income, in proportion to their numbers.[22] The proceeding continued although the Hoopa Valley Tribe, whose interests were at stake, was not a party.

In 1972, a Trial Commissioner sustained that collateral attack on the 1958 Departmental decision; he recommended that the Hoopa Valley Tribe did not own the unallotted land of the Square. Examining the Executive Order of October 16, 1891, which extended the limits of the Hoopa Valley Reservation, the Commissioner concluded that

> "The plain and natural effect of the order was to create an enlarged reservation in which the Indians of the original reservation [the Square] and the Indians of the added tracts [the Klamath River Reservation] would have equal rights in common."

App. B 101. This followed, the Commissioner believed, because the "words in an executive order . . . are 'to be read in their natural and ordinary sense'." *Id.* 10. Thus, he ruled, plaintiffs are entitled to share in Hoopa Square tribal revenues notwithstanding their lack of membership in the Hoopa Valley Tribe. He gave no weight to the many occasions in which the rights of the two groups had been treated as separate by Congress and the Executive.

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[22] In 1976, the Court of Claims permitted more persons to intervene, bringing the total number of plaintiffs to about 3,800. Later, the court closed the class, but new claimants kept appearing, so they had to bring a new action seeking the same relief in *Ackley v. United States,* Ct. Cl. No. 460-78.

In 1973, the Court of Claims endorsed per curiam the Commissioner's 115-page report and findings and remanded the matter to him to decide which, if not all, of the 3,800 plaintiffs could recover shares of the Hoopa timber income, going all the way back to 1955. App. B 1-2. The Hoopa Valley Tribe's motion to intervene also was granted.

The United States and the Hoopa Valley Tribe applied to this Court for writs of *certiorari*, which were denied. 416 U.S. 961 (1974). Justices Douglas and Stewart would have granted certiorari.

For more than five years thereafter, the Commissioner struggled with little success to formulate rules to define the eligible plaintiffs.[23]

In 1979, in an effort to bring a degree of manageability to these proceedings, the United States attempted to encourage the Klamath River Indians to adopt a constitution and define themselves.[24] The United States also moved to substitute the Yurok Tribe as the real party plaintiff, in place of the 3,800 individual plaintiffs. It argued that the plaintiffs could have property rights in unallotted resources of the Hoopa Square only by virtue of their membership in a tribe (*i.e.*, the Yurok or other Klamath River Tribe), and not through mere descent from long-deceased Klamath River or Hoopa individuals. By plebiscite, however, the plaintiffs voted overwhelmingly not to organize a tribe. App. A 6.

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[23] App. A 13. On remand the parties have been briefing such questions as whether a person of one-sixteenth or one-thirty-second or one-sixty-fourth degree Indian blood was eligible to share and whether a person who had never lived on or near the Reservation could be deemed an "Indian of the reservation". After such "eligibility" criteria were established, the eligibility of each plaintiff, if challenged, would be litigated.

[24] See 25 C.F.R. Parts 55, 55a. Remarkably, an additional federally recognized reservation, the "Resighini Reservation," was established in 1939, 7 Kapp. 1431, and currently exists within the Klamath River Reservation. See App. H 5. Resident Indians of that reservation (who are a federally recognized tribe and who won a claim in the Court of Claims in 1977 arising out of their reservation, see *Coast Indian Community v. United States*, 550 F.2d 639, an award in which the Hoopas did not share) are among the plaintiffs claiming rights on the Hoopa Square in the instant case.

At approximately the same time, the Hoopa Valley Tribe moved to dismiss this case on the grounds that (1) "eligibility" rules for sharing in the Hoopa Square present a political question, involving essentially creation of a new "tribe" which neither Congress nor the Secretary has chosen to recognize, and (2) such "eligibility" rules cannot be derived from any judicially-cognizable legal standards, in the words of *Baker v. Carr*, 369 U.S. 186, 217 (1962).

In 1980, the Commissioner denied both motions. He acknowledged the difficulty of setting standards for determining which of the plaintiffs are "Indians of the Hoopa Valley Reservation," and felt it might be necessary to invite *amicus curiae* comment and to retain a court-appointed expert for assistance. *See* App. A 13.

On September 23, 1981, the Court of Claims affirmed the Commissioner's decisions, but expressed irritation with his plea for assistance, noting that the *Short* case is the oldest case on its docket. *See* App. A 13. The court brushed aside the United States' argument that the plaintiffs' right to share must be "tribal" in nature. The court reviewed its 1973 decision and concluded that it had "firmly and unequivocally held that *individual* Indians are entitled to recover." App. A 7 (emphasis added). Not only did the court recognize vested individual rights of the Klamath River Indians in the unallotted lands of the Square, but the court also apparently held that as far as the Hoopas were concerned, their land rights too are owned individually, not tribally. *I.e.*, all unallotted lands are owned by a class of thousands of individuals, including Hoopas, Klamath River Indians, and others, and no part is owned by the Hoopa Valley Tribe *qua* tribe.[25]

REASONS FOR GRANTING THE WRIT

The 1981 decision of the Court of Claims is the first substantive opinion of the court itself in this case; its summary affirmance in 1973 of the cryptic 115-page recommended decision of the Commissioner gave little indication of the true direction in which the Court of Claims was moving. Now, for the first time, the court has revealed that it has departed from the well-settled rule that unallotted reservation property is held tribally, not individually. As a consequence, administration of the unallotted Hoopa assets will be virtually impossible under the Court of Claims' expanded ruling. Henceforth the United States will have to deal with thousands of individuals rather than a single, federally recognized tribal government. Moreover, the legal incidents of this unprecedented form of Indian property are unknown, and the voice of its owners in management and distribution decisions undefined. Since this new property interest is neither tribal nor allotted, the application of the federal statutes, which apply alternatively to tribal or allotted trust lands, is doubtful. *See, e.g.*, 25 U.S.C. §§ 406, 407 (timber sales).

The decision below, divesting the Hoopa Valley Tribe of the unallotted tribal lands and resources of the Hoopa Valley Reservation, and conferring ownership upon an undetermined number of descendants of former inhabitants of the reservation without regard to tribal membership, has disastrous implications for the Hoopa Valley Tribe, for many other tribes, and for federal Indian policy.

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[25] Paradoxically, in determining which non-tribal members will share in unallotted resources of the Square, the court ruled that *Hoopa Tribe enrollment standards* will apply. App. A 14.

For the Tribe, divestiture of its lands, resources and revenues will effectively "terminate" the Tribe and render it little more than a "private, voluntary organization", *United States v. Mazurie*, 419 U.S. 544, 557 (1975), contrary to a long series of actions and expectations of Congress and the Executive. The Court of Claims decision also seriously threatens other tribes since it is based on general language in the executive orders establishing and enlarging the Reservation "for Indian purposes," and similar general language is found in the organic documents of scores of tribes, see App. F. This result has been accomplished in the face of consistent precedent and federal policy confirming that unallotted lands and resources belong to the tribe, not individual tribal members (much less non-members).

Although this Court denied *certiorari* in 1974, there are pressing reasons why exercise of this Court's supervisory powers over the Court of Claims is now called for. The previous denial of *certiorari* clearly does not preclude grant of review now,[26] and, as a discretionary matter, the Court should not treat its previous denial as final. The Court of Claims' 1981 decision goes substantially beyond its 1973 ruling and federal Indian law has evolved considerably in the direction of tribal primacy since 1974. It is primarily because of subsequent decisions of this Court and subsequent enactments of Congress that the extent of the Court of Claims' errors and the implications of those errors for other tribes and reservations have become manifest.[27]

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[26] *See Washington v. Washington Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *see also Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Mercer v. Theriot*, 377 U.S. 152 (1964). The previous denial of *certiorari* imports no expression of opinion by the Court of the merits of the case, *see, e.g., United States v. Carver*, 260 U.S. 482, 490 (1923); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973), and does not establish the law of the case for the Supreme Court itself. *See Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941).

Despite the clear thrust of these developments, the 1981 decision of the Court of Claims terminated tribal ownership in favor of individual ownership interests in the unallotted resources of the reservation and judicially established criteria for eligibility for such ownership which differ from those established by the United States and the recognized tribal government. This disregard of federal law and arrogation of political power by the Court of Claims should be reviewed by this Court.

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[27] Over the last eight years, Congress has emphasized that Indian tribes, not individual persons of Indian descent, are the focus of federal Indian legal and economic policy, and that the tribes, as self-governing entities, shall themselves determine their destiny. *See, e.g.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*, and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* Concurrent with and subsequent to the denial of *certiorari*, this Court has repeatedly endorsed these principles of tribal primacy. *See United States v. Wheeler*, 435 U.S. 313 (1978); *Morton v. Mancari*, 417 U.S. 535, 542-43 (1974); *United States v. Mazurie*, 419 U.S. 544, 558 (1975); *Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-46 (1980). *See also Logan v. Andrus*, 640 F.2d 269 (10th Cir. 1981), *cert. denied*, —— U.S. ——, 50 U.S.L.W. 3245 (No. 80-1848, October 5, 1981). Most importantly, this Court has steadfastly held that tribal rights or status or authority should not be diminished or terminated without a clear expression of intention to do so by Congress. *E.g., Bryan v. Itasca County, supra*, 426 U.S. at 392-93.

I. THE COURT OF CLAIMS' DECISION WILL UNLAWFULLY TERMINATE THE HOOPA VALLEY TRIBE.

A. The Court of Claims Violated the Rule of *Mattz v. Arnett* and Subsequent Decisions By Terminating the Hoopa Valley Tribe Without Requiring Clear Manifestation of Congressional Intent.

Since time immemorial the unallotted land of the Hoopa Square, set aside as an Indian reservation in 1864, has been used and occupied as tribal property by the Hoopa Valley Tribe. During the past thirty years, as the market value of the Hoopas' timber has increased, the funds derived from these unallotted resources have been the principal source of revenues for Hoopa tribal governmental services on the Hoopa Valley Reservation. Without those revenues and its property base the Tribe cannot survive. Tribal government is the cornerstone of economic development in the area and is virtually the only employer.

Removal of the economic base of the Hoopa Valley Tribe will clearly lead to economic termination of the Tribe. Political termination will follow when 3,800 new non-tribal owners observe that they have an overwhelming majority voice.[28] In light of the refusal of the plaintiffs to organize as an Indian tribe, a final expectable consequence will be their seeking sale of all Reservation assets for one final large individual payment.

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[28] Suit has already been brought to compel that result in the *Puzz* case, note 3 *supra.*

Petitioner uses the word "termination" as a shorthand reference to the effects of the Court of Claims' decision, which will force the U.S. to discontinue treating the Hoopa Square and the Klamath River Reservation as two distinct governmental units. This in turn may force the U.S. to withdraw recognition of the Hoopa Valley Tribe as the governing tribe of the Square. In addition, non-resident plaintiffs may choose to authorize environmentally damaging action on the Square for individual gain. Although federal laws extending to "Indian country" will still presumably apply, and Indian immunities from state taxes remain—at least for a time—the consequences to the Hoopa Valley Tribe are so severe that "termination" is a fair reference.

The effective termination of the Tribe in these circumstances cannot be squared with the decisions of this Court: no act of Congress has mandated this result. The Court of Claims insists that its decision, in light of silence of the Executive Order as to whether the Klamath River Indians were to be co-owners of the Square, is based upon the "plain and natural effect of the [Executive] order." App. B 101. Yet in case after case this Court has required that federal determinations to terminate Indian rights *not* be based on silence but

> "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

Mattz v. Arnett, 412 U.S. 481, 505 (1973). Continued reservation status in *Mattz* was important to preserve tribal fishing rights, but loss of those rights pales by comparison to the impact of divesting tribal ownership of the Hoopa unallotted lands. In *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), the Court stated:

> "We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (*see Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67) 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" *Id.* at 412-13.

The Court applied the same standard in *Bryan v. Itasca County*, 426 U.S. 373 (1976), in deciding whether Public Law 83-280 terminated certain reservation Indian tax immunities. There the Court explicitly applied the standard defined in *Mattz v. Arnett, supra. Id.* at 393.[29]

In those few cases where this Court has concluded that a tribe was terminated or a reservation diminished or disestablished, it has done so with the greatest reluctance and only upon evidence that that was the clear intention of the Congress or the Executive. *See Rosebud v. Kneip,* 430 U.S. 584 (1977); *DeCoteau v. District County Court,* 420 U.S. 425 (1975). *See also United States v. Jim,* 409 U.S. 80 (1972) and *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73 (1977) (unequivocal congressional statement necessary before Indian rights to income are diminished or terminated). No such restraint has been exercised by the Court of Claims; its decision should be reviewed because it is wrong, it will destroy an Indian tribe recognized by Congress and the Executive, and it has major implications for many other reservations and for Indian law generally, as detailed below.

B. The Court of Claims Violated Familiar Principles of Indian Law.

Principles of Indian law developed by this Court require that courts, when interpreting statutes, agreements and executive orders affecting Indians, exercise their judicial powers with recognition of the unique relationship of the tribes and the United States.[30] *See Washing-*

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[29] *See also United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1005 (8th Cir. 1976). Similarly, in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 70-72 (1978), this Court refused to find a cause of action for enforcement of the Indian Civil Rights Act absent an unequivocal congressional expression, in view of Congress' awareness of the intrusive effect of judicial review upon tribal self government.

[30] *See generally Worcester v. Georgia,* 31 U.S. 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886). As the Court expressed it in *Kagama* (a case arising on the Hoopa Square): "These Indian tribes *are* the wards of the Nation. . . . From their very weakness

ton v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-79 (1979). The Court of Claims completely ignores these critical signposts. Instead, referring to the terms of the 1864 statute and the 1891 Executive Order, the Court of Claims held:

> "Such words . . . are 'to be read *in their natural and ordinary sense, giving them a meaning to their full extent and capacity*, unless some strong reason to the contrary appears (*Miller v. Robertson*, 266 U.S. 243, 250 (1924)).' No reason to the contrary appearing, the order is to be given its natural effect of granting to the Indians of the Addition, as Indians of the enlarged reservation, rights in the reservation equally with the Indians of the Square."

App. B 10 (emphasis added). *Miller* was not an Indian case. The Court of Claims literally turns the pertinent canons upside down by construing silence in the statute and Executive Orders regarding Hoopa tribal rights as incompatible with vested, continuing rights reserved by the 1864 Agreement.[31]

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and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection." 118 U.S. at 383-84.

[31] In the 1864 Agreement between the United States and the Hoopas and their allies, the United States "agree[d] and obligate[d] itself to set aside" the reservation for the tribes represented. App. B at 21. As this Court pointed out in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979), "it is the intention of the parties, and not solely that of the superior side," which must govern any attempt to interpret such agreements, and "the United States . . . has a responsibility to avoid taking advantage of the other side." *Id.* Agreements with Indians are not to be construed according to the technical meaning of their words to learned lawyers but in the sense in which they would likely be understood by the Indians, *see Jones v. Meehan*, 175 U.S. 1, 11 (1899). The lower court disregarded both the Indians' understanding and the United States' duty of good faith and fiduciary obligation to the Hoopa Valley Tribe. Here, as in *Fishing Vessel Ass'n*, the United States'

Further, contrary to the decisions of this Court, the Court of Claims ignored contemporary federal Indian policy of strengthening tribal government and assiduously *protecting* tribal rights. Tribal self-determination, the ability of Indian tribes to manage and control their own political, economic, social and cultural destinies, has been the cornerstone of federal Indian policy since 1934 when Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.* The enactment of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*, and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*, gave substantial additional impetus to these policies. The recent cases of this Court consistently recognize that contemporary federal policies focus upon strengthening tribal self-government and that those policies should guide the courts in interpreting federal statutes, regulations and executive orders. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *Bryan v. Itasca County*, 426 U.S. 373, 389 n.14 (1976). These congressionally-created and judicially-recognized policies are completely at odds with the decision of the Court of Claims which eliminates tribal ownership and control of the unallotted lands and resources of the Hoopa Square, and vests such ownership and control in an unknown number of individuals to be identified by the Court of Claims in its unguided discretion.

The Court of Claims decision furthers a policy of "individualization" of Indian ownership and control long since rejected by the Congress. The allotment policy enacted by the Dawes Act of February 18, 1887,

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representatives were "well aware of the 'sense' in which the Indians were likely to view assurances." 443 U.S. at 676. It was to be their reservation alone, subject only to sharing with other Indians who would take up residence there. *See* note 9 *supra.*

25 U.S.C. §§ 331 *et seq.*, was a national tragedy and was repudiated by Congress in the Indian Reorganization Act of 1934. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 477-79 (1976). The Court of Claims has clearly violated the admonition endorsed by this Court in *Bryan v. Itasca County*, that courts

> "are not obliged in ambiguous instances to strain to implement policy Congress has now rejected, particularly where to do so will interfere with the present Congressional approach to what is, after all, an ongoing relationship."

426 U.S. at 389 n.14, citing *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975).

The Court of Claims concluded simply that since the 1864 Act authorized only four tracts of land for Indian reservations without specifying which tribes would be accommodated there,

> "No Indian tribe resident upon a reservation created under the Act could obtain vested rights to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation."

Appendix B at 99. But even if it were true that the Hoopa Valley Tribe had acquired no vested rights in the Square by 1891, which Petitioner disputes, the next step in the Court of Claims' logic is unprecedented: The Court of Claims concluded that the "natural effect" of the 1891 Executive Order enlarging the reservation must be to grant to Indians *individual* equal rights in the entire reservation including the Square. *See* App. B 10. But no language in the 1864 Act or the 1876 or 1891 Executive Orders "allots" or otherwise "individualizes" the reservation and its resources, and since the expanded reservation continued to be subject to the same Presidential authority, it is impossible to understand how these individual Indians or their descendants ever acquired compensable vested ownership rights. In effect the

Court of Claims has created a bastard, a novel kind of Indian property which is neither allotted nor tribal.[32]

II. UNALLOTTED RESERVATION LANDS BELONG TO TRIBES, NOT TO INDIVIDUAL INDIANS.

The remarkable conclusion of the Court of Claims divesting the Hoopa Valley Tribe of its ownership of unallotted lands in favor of individual Indians and their descendants, contradicts the consistent holding of the federal courts that, absent allotment, reservation property is *tribal* property in which *individual Indians have no separate ownership interest.* F. Cohen, *Handbook of Federal Indian Law* 288 (1942); *Cherokee Nation v. Journeycake,* 155 U.S. 196, 207 (1894); *Cherokee Nation v. Hitchcock,* 187 U.S.

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[32] The Court of Claims also expanded a narrow exception to the doctrine of sovereign immunity to obtain jurisdiction here. In non-contract cases, it has no jurisdiction unless the plaintiff sues for money improperly exacted or retained or the basis of the claim—whether it be the Constitution, a statute, a regulation or another source—mandates the payment of money damages. *United States v. Testan,* 424 U.S. 392, 401-02 (1976). But 25 U.S.C. §§ 406-07 are comprehensive and authorize the payment of timber revenues only to enrolled tribal members in the case of timber harvested from unallotted lands or to allottees in the case of timber harvested from allotted trust lands. *See White Mountain Apache v. Bracker,* 448 U.S. 136, 145-47 and n.10 (1981). Clearly, no statute mandates either payment of timber revenues to plaintiffs or compensation for breach of that mandate.

Therefore, the "individualized" property concept was necessary to analogize this case to those in which money has been improperly exacted or retained and which require no express waiver of sovereign immunity. *See Testan,* 424 U.S. at 400 and *Eastport S.S. Corp. v. United States,* 372 F.2d 1002, 1007-08 (Ct. Cl. 1967). But unlike the usual such case seeking a return of money or property improperly held by the federal government, plaintiffs here seek *damages* which must be paid directly from the federal treasury. *Cf. Edelman v. Jordan,* 415 U.S. 651, 663 (1974) (a suit seeking to impose a liability which must be paid from public funds in a state treasury is barred by the Eleventh Amendment). Thus *Short* represents an expansion of the narrow "money improperly exacted or retained" rule of jurisdiction.

294, 307 (1902); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912); *McDougal v. McKay*, 237 U.S. 372, 383 (1915). In *Cherokee Trust Funds*, 117 U.S. 288, 308 (1886), for example, this Court rejected the notion that individual Indians have a legal right to share in the proceeds of tribal land sales:

> "The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them."

In the *Potawatomi* case the Court of Claims described the nature of Indian title as a "right to use only":

> "This right to use the land is, however, the property of the band, tribe or nation of Indians that occupies the land . . . . The individual's right to use depends upon tribal law or custom. The tribal right to use is communal. *No instance is known of individual ownership of tribal lands.*" Emphasis added.[33]

Moreover, Congress' understanding that unallotted reservation lands are tribally-owned has been repeatedly manifested throughout the federal statutes requiring that tribes consent to, or receive compensation for, use of unallotted reservation land.[34]

Further, this Court has held that modification by Congress of Indian reservation rights does not give rise to individual claims. *See United States v. Jim*, 409 U.S. 80

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[33] *Prairie Band of Potawatomi Indians v. United States*, 143 Ct. Cl. 131, 143 (1958), *cert. denied*, 359 U.S. 908. *See also Halbert v. United States*, 283 U.S. 753, 762-63 (1931); *Sizemore v. Brady*, 235 U.S. 441, 446 (1914); *Whitefoot v. United States*, 155 Ct. Cl. 127, 133-35 (1961); *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196 (1894).

[34] *See, e.g.*, 25 U.S.C. §§ 314, 319, 320, 321, 396a, 398, 398b, 402a, and 407. *See also Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1235 (4th Cir. 1974).

(1972); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912). In the face of these authorities, the Court of Claims' conclusion that the 1864 statute and the 1876 and 1891 executive orders "individualized" the property on the Square can hardly be characterized as a "natural" inference.

III. THE COURT OF CLAIMS' DECISION THREATENS AT LEAST 68 RESERVATIONS THROUGHOUT THE UNITED STATES.

The holding below, which foretells termination of the Hoopa Valley Tribe, is an ominous precedent for other reservations as well. Because the reservation created for the Hoopa Valley Tribe was subject to the possibility of other Indians being moved to the reservation and acquiring rights thereon, the Court of Claims concluded that the 1876 Executive Order setting apart the reservation "for Indian purposes" did not confirm title in the Tribe. The court presumably supposed the land was owned by all people of the reservation, a class expanded, the court said, by the 1891 Executive Order to include all Indians of the Klamath River Reservation as well, App. B 99-103.

At least 68 other reservations are owned beneficially by tribes under treaty and executive order language virtually identical to that here, in not limiting the President to locating a particular tribe thereon. See citations collected at Appendix F. The court's ruling jeopardizes the heretofore established property interests of those tribes. The court's conclusion that individuals own the unallotted lands rests on two facts. First, the accommodation of all California Indian tribes on a few reservations made it likely that each reservation would be occupied by more than one tribe, App. B 6. In the second half of the 19th century, the federal policy of locating Indians on fixed reservations was established. *See generally*, F. Cohen, *Handbook of Federal Indian Law* 12-29 (1942). Often, several tribes were located on one reservation. Consolidation on reservations, although initiated in California, *see* Annual Report, Commissioner of Indian Affairs (1858) at 9-10, and mandated there by the 1864 Act, in fact characterized federal policy for several decades. As recently noted in D. Getches, *Federal Indian Law* at 57-58 (1979),

> "The consolidation of separate tribes—usually with diverse cultures and often with backgrounds of outright hostility towards each other—was a method used to establish numerous 'confederated reservations' in the Northwest and Great Plains areas."

Second, the Court of Claims relied upon the fact that the 1876 and 1891 executive orders described the reservation beneficiaries in general terms, not explicitly limited to the Hoopa Valley Tribe. App. B 99.

These two circumstances are virtually ubiquitous in the Western United States. Few reservations were explicitly created for the Indian tribe which is recognized today by the United States as the beneficial owner. The documents establishing most reservations use general language or no language to describe the Indian beneficiaries.[35]

The Court of Claims apparently thought that continuing *authority* to settle other Indians on a reservation (whether or not exercised) was, by itself, sufficient to prevent vesting a recognized governing tribe with title to the unallotted lands. If the Court of Claims' construction of the organic documents here is sound, then a share of the tribal land of 68 threatened Indian reservations may now be claimed by any descendant of a person who, sometime in the history of the reservation, was eligible to settle there.

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[35] Illustrative executive orders and treaties of some 68 similarly situated reservations are collected in Appendix F. One variety names one or more tribes but leaves the class of tribal beneficiaries open, typically allowing the President to place upon the Reservation "such other Indians" as he may see fit. App. F 1 (Group 1). Another variety specifies tribes or bands as beneficiaries, many of which no longer exist as organized or federally-recognized entities. App. F 9 (Group 2). A third variety states that land is set apart for "Indian purposes" without specifying any Indian tribe. App. F 16 (Group 3). The Hoopa Reservation belongs in all three groups because of the 1864 Act (Group 1), the 1864 Agreement with the Hoopas and with several allied tribes which no longer exist as separate federally-recognized tribes (Group 2), and the language of the 1876 and 1891 Executive Orders (Group 3).

The United States may be held liable in numerous suits based upon the instant suit, in which it will be argued that the government has improperly refused to recognize the non-tribal descendants of persons somehow connected with reservations[36] as the beneficial owners of the unallotted resources. Disgruntled tribal members also could assert ownership of individual shares. Foreseeably this could lead to massive incursions on the federal treasury and the termination of dozens of federally-recognized Indian tribal governments.

IV. THE COURT OF CLAIMS ARROGATED A QUESTION RESERVED TO THE POLITICAL BRANCHES.

The Secretary of the Interior's express recognition (and Congress's implicit recognition) of the Hoopa Valley Tribe as the governing body and beneficial owner of the Hoopa Square are matters of federal policy, not law. The federal courts have always shown great reluctance to interfere with the broad powers given to Congress and the Executive in Indian matters by the Constitution, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902). The Court of Claims itself has adhered to this rule in the past:

> "The Government's jurisdiction over Indian tribal affairs, including their landed and monetary estate, is plenary and exclusive. It is for Congress and Congress alone to determine how their lands should be held or divided, and how their tribal Indian funds should be apportioned among them."

McCalib v. United States, 83 Ct. Cl. 79, 85 (1936), *accord*, *Chippewa Indians of Minnesota v. United States*,

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[36] The 1891 Executive Order extending the reservation boundaries here is not a distinguishing factor from the other 68 reservations. The 1891 Order had no language merging rights; it merely enlarged the number of individuals eligible to claim an interest in the Square (according to the Court of Claims).

88 Ct. Cl. 1, 47, *aff'd*, 307 U.S. 1 (1939). Yet the Court of Claims' construction of the 1864 Act and 1876 and 1891 Executive Orders cannot be squared with the Congressional authorization of the Klamath River Reservation in 1855, the Congressional disposal of it in 1892 for the benefit of the Klamath River Indians, and the Congressional restoration of land to those Indians in 1958. These Congressional actions treated the Klamath River residents separately from the Hoopa Square residents. Such recognition by Congress of separate rights of the two groups of Indians is a political act not alterable by the Court of Claims.

Similarly, the Executive has recognized the two groups of Indians as having separate rights. The 1864 agreement itself specified that the Hoopa Square was for the "sole benefit" of the Hoopas and their allies, and such other Indians who availed themselves of the agreement (*i.e.*, moved there).[37] The plaintiffs never moved there and consequently obtained no rights there. The Executive recognized this in 1915, *see* note 19 *supra*. It also recognized this in 1898 and 1922 when it allotted the Klamath River and Hoopa Reservations to the respective residents thereof, see pp. 8-9 *supra*. In 1933 the Executive recognized that the Hoopa Valley Tribe was the proper government of the Square. *See* pp. 10-11 *supra*. In 1958 the Executive ruled that the resources of the Square belonged to the Hoopa Valley Tribe. *See* 65 I.D. 59 (1958), App. G.

The recognition by Congress and the Executive of the Hoopa Valley Tribe as beneficial owner and governing body of the Hoopa Square is an unreviewable political question, *see United States v. Holliday*, 70 U.S. 407, 419 (1865); *United States v. Sandoval*, 231 U.S. 28, 45-48 (1913). *See also Baker v. Carr*, 369 U.S. 186, 215-16, 282

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[37] Congress implicitly ratified this treaty by appropriating money to implement it. See p. 5 *supra*.

(1962).[38] The Court of Claims' interference in this area is a dangerous precedent and should be reviewed.

V. THERE IS A CONFLICT WITH THE NINTH CIRCUIT.

The Court of Claims' ruling that all Indians of the combined reservations have equal individual interests in all resources of the combined reservation conflicts with a recent decision of the United States Court of Appeals for the Ninth Circuit.[39]

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

January 21, 1982

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[38] Furthermore, the Executive actions did not receive the deference to which they are entitled, based on expertise. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 (1976); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[39] In *Blake v. Arnett*, 663 F.2d 906 (9th Cir. Dec. 14, 1981), Yurok Indians brought suit to establish their right to cross non-Indian lands on the Hoopa Valley Reservation for fishing purposes. The defendants moved to certify a class and the District Court, consistent with the Court of Claims' view in the instant case, held that the plaintiffs were representative of all Indians having hunting and fishing rights within the Reservation. *Id.* at 912. The Court of Appeals reversed:

> "We conclude that the evidence does not support the court's finding that 'the interests of the Yurok and Hoopa Indians . . . coincide precisely in this case. . . . [B]ecause the Hoopa Square had a quite different origin from the [Klamath River] Reservation, and the Connecting Strip had a still different origin, and because the history of each is different, and because the Act of 1892 does not apply to the Hoopa Square or the Connecting Strip, we conclude that there is a sufficient likelihood of conflict of interest between the Yuroks and the Hoopas, and a sufficient likelihood of inadequate representation of the Hoopas by the plaintiffs, to make the inclusion of the Hoopas in the class an abuse of discretion." *Id.* at 913.

Appendix

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ALEXANDER L. STEVAS,
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No. 81-1371

In The

Supreme Court of the United States

October Term, 1981

Hoopa Valley Tribe of Indians,
Petitioner,

v.

Jessie Short, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF APPENDICES

Page

A—Opinion of Court of Claims, Sep. 23, 1981 .... A1

B—Opinion and Findings of Court of Claims, October 17, 1973 .... B1

- —Act of April 8, 1864, 13 Stat. 40 .... B16
- —Treaty or Agreement of 1864 .... B21
- —Executive Order of June 23, 1876, 1 Kapp. 815 .... B28
- —Executive Order of October 16, 1891, 1 Kapp. 815 .... B30

C—Act of June 17, 1892, 27 Stat. 52 .... C1

D—Act of May 19, 1958, 72 Stat. 121 .... D1

E—Decisions of Dept. Int., *Crichton v. Shelton*, 33 I.D. 205 (1904) E1

F—Acts, Treaties, and Executive Orders of Some Indian Reservations with Organic Language Similar to That of the Hoopa Valley Reservation F1

- Part 1. Reservations created for a class of beneficiaries which is open-ended F1
- Part 2. Reservations created for tribes some of whom no longer exist as organized, federally-recognized entities F9
- Part 3. Reservations created without specifying a tribe as beneficiary F16

G—Decisions of Dept. Int., *Rights of Indians in the Hoopa Valley Reservation*, 65 I.D. 59 (1958) G1

H—Bureau of Indian Affairs, Annual Report on Indian Lands (1971) H1

In the United States Court of Claims

No. 102–63

(Decided September 23, 1981)

JESSIE SHORT, et al.
v.
THE UNITED STATES, Defendant, and
HOOPA VALLEY TRIBE OF INDIANS, Defendant-Intervenor

Harold C. Faulkner, attorney of record, and *William C. Wunsch, Weyman I. Lundquist*, and *William K. Shearer*, for certain plaintiffs. *Wallace A. Sheehan, Faulkner, Sheehan & Wunsch*, and *Heller, Ehrman, White & McAuliffe*, of counsel.

Clifford L. Duke, Jr., attorney of record for certain plaintiffs. *Bryan R. Gerstel* and *William K. Shearer, Duke & Gerstel*, of counsel.

James E. Brookshire, with whom was *Acting Assistant Attorney General Anthony C. Liotta*, for defendant. *Duard R. Barnes*, Department of the Interior, of counsel.

Jerry C. Straus, attorney of record for defendant-intervenor. *Edward M. Fogarty, Jerry R. Goldstein*, and *James A. Michaels, Wilkinson, Cragun & Barker*, of counsel.

Before FRIEDMAN, *Chief Judge*, DAVIS, *Judge*, SKELTON, *Senior Judge*, NICHOLS, KUNZIG, BENNETT and SMITH, *Judges, en banc*.

ON REQUEST FOR REVIEW OF TRIAL JUDGE'S OPINIONS DENYING DEFENDANT'S MOTION TO SUBSTITUTE AND DEFENDANT-INTERVENOR'S MOTION TO DISMISS

FRIEDMAN, *Chief Judge,* delivered the opinion of the court:

In this suit, some 3,800 individuals who claim to be Indians of the Hoopa Valley Indian Reservation in Northern California (the Reservation) seek to recover their shares in the income from the sale of Reservation timber that the government distributed exclusively to another group of Indians of the Reservation. In *Short* v. *United States,* 202 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied,* 416 U.S. 961 (1974) (the 1973 decision), we held the government liable to qualified Indians of the Reservation who were entitled to but did not receive shares in this income, and we rendered judgment in favor of 22 individual plaintiffs who had proved their entitlement. We also permitted the Hoopa Valley Tribe, the group of Indians to whom the government theretofore had distributed the timber income exclusively, to intervene as a party defendant.

The case is now before us on requests for review by the United States and the Hoopa Valley Tribe (collectively, the defendants) of two decisions of Trial Judge Schwartz denying (i) the United States' motion to substitute for the plaintiffs as the real party in interest an entity called the Yurok Tribe, and (ii) the Hoopa Valley Tribe's motion to dismiss the suit on the ground that it involves nonjusticiable political questions. The government states that if its motion to substitute is denied, it then joins in the motion to dismiss. We agree with and affirm the trial judge's decisions.

I.

A. The facts relevant to the case's present posture, which we briefly review here, were the subject of extensive findings in our 1973 decision. *See* 202 Ct. Cl. at 885–987, *passim.*

The timber revenues at issue derive from unallotted, trust-status lands on a portion of the Reservation known as the Square. This is an area 12 miles square, which constituted the entire original Hoopa Valley Reservation when that reservation was established in 1864. Fdgs. 10–21, 202 Ct. Cl. at 888–99. An area contiguous to the Square, inhabited then as now primarily by Yurok Indians and known as the Addition, was added to the Reservation in 1891. Fdgs. 33–34, 202 Ct. Cl. at 902–03.

In 1950, the Indians of the Square established an organization known as the Hoopa Valley Tribe (fdg. 145, 202 Ct. Cl. at 962), whose membership excludes the plaintiffs. Fdg. 143, 202 Ct. Cl. at 961. Beginning in 1955, the Secretary of the Interior, pursuant to requests by the Hoopa Valley Tribe's Business Council, distributed the revenues from the timber sales annually in per capita payments to the Indians on the official roll of the Hoopa Valley Tribe, to the exclusion of the Indians of the Addition. Fdgs. 171, 173, 202 Ct. Cl. at 971–72, 973. The Secretary took this action on the basis of an opinion of the Solicitor of the Department, 65 Dec. Dep't Int. 59 (1958), *reprinted in* 2 U.S. Department of the Interior, Opinions of Solicitor of the Department of the Interior Relating to Indian Affairs, 1917–1974, at 1814, that the Square and the Addition were separate reservations. Fdg. 174, 202 Ct. Cl. at 973. Between 1955 and February 1969, these payments totaled approximately $12,650,000. Fdg. 172, 202 Ct. Cl. at 972.

In 1963, the plaintiffs, each of whom claims to be an Indian of the Addition area of the Reservation, brought this suit against the United States, as trustee and administrator of the timber resources of the Reservation, seeking their shares of the revenues the government had distributed to individual Indians of the Reservation. Following a trial and after briefing and oral argument, we held in 1973 that the Secretary's treatment of the Square and the Addition as separate reservations in which the Indians of each had exclusive rights to the resources of their area was erroneous. 202 Ct. Cl. at 884–85, 486 F.2d at 567–68. Adopting the trial judge's opinion and detailed findings (202 Ct. Cl. at 872–73, 486 F.2d at 561), we held that the Square and the Addition together constituted a single reservation, that all the Indians of that Reservation were entitled to share in all of its revenues that were distributed to individual Indians (including the timber revenues from the Square), and that the plaintiffs who were Indians of the Reservation were entitled to recover the monies the government withheld from them. Fdgs. 188–89, 202 Ct. Cl. at 980–81.

We also ruled that 22 of 26 named individual plaintiffs, whose cases had been chosen as representative of the plaintiff group, *see* 202 Ct. Cl. at 874, 486 F.2d at 562, had established that they were Indians of the Reservation. 202 Ct. Cl. at 885, 486 F.2d at 568; fdgs. 191–217, 202 Ct. Cl. at 982–87. We held that these 22 plaintiffs "are entitled to recover, as Indians of the Hoopa Valley Reservation, an aliquot share in the revenues of the unallotted trust-status lands of the entire reservation . . . , the amount of recovery to be determined following trial of the claims of the remaining plaintiffs." Fdg. 217, 202 Ct. Cl. at 987. We remanded the case for a retrial of the claims of the four remaining representative plaintiffs and a determination of the rights of the remaining plaintiffs to recover. 202 Ct. Cl. at 873, 885, 987–88, 486 F.2d at 561, 568.

The Supreme Court denied petitions for certiorari filed by the Hoopa Valley Tribe and the United States. 416 U.S. 961 (1974).

B. Since our 1973 decision, the parties and this court have taken a number of steps looking toward the determination and identification of the Indians of the Reservation who are entitled to recover.

In 1976, we permitted 515 additional persons to intervene as plaintiffs as of the time the suit was instituted, thus increasing the number of plaintiffs to approximately 3,800. We also closed the class. *Short* v. *United States,* 209 Ct. Cl. 777 (1976).

Each plaintiff then filled out a life-history questionnaire developed and agreed upon by the parties. *See Hoopa Valley Tribe* v. *United States,* 219 Ct. Cl. 492, ___, 596 F.2d 435, 439 (1979). Between September 1976 and May 1977, at the behest of the trial judge, the parties filed successive cross-motions for summary judgment for and against some 3,200 plaintiffs. We referred these motions to the trial judge for recommended decision. *Short* v. *United States,* 212 Ct. Cl. 522 (1976). With the consent of the defendants, we granted summary judgment for 121 additional plaintiffs whose status as Indians of the Reservation the defendants did not contest. *Short* v. *United States*, No. 102–63 (orders entered December 3, 1976, February 25, 1977, and April 27, 1978).

The trial judge has not issued any recommended decisions on the remaining cross-motions for summary judgment because of (i) protracted but unsuccessful efforts to settle the case and (ii) the filing of the motions before us.

II.

The Motion to Substitute

A. After efforts to settle this case failed, the trial judge in September 1978 reconvened proceedings on the pending summary judgment motions. Shortly before a scheduled status conference to determine the course of proceedings, the government began efforts to organize a Yurok Tribe.

In November 1978, 15 days before the status conference, the Assistant Secretary for Indian Affairs of the Department of the Interior issued a letter to the plaintiffs in this case and to all members of the Hoopa Valley Tribe announcing a plan to organize a Yurok Tribe as the "first step" for "resolv[ing] the dispute over the use and benefit of the Hoopa Valley Reservation and remov[ing] the impediments to self-determination" on the Reservation.

The Assistant Secretary stated that he intended to conform to this court's 1973 decision by "designat[ing] the Hoopa Valley Tribe and the Yurok Tribe as the Indians of the Reservation who are entitled to use and benefit from the Reservation and its resources." Since no Yurok tribal organization existed and the membership of the Tribe was not established, the Assistant Secretary announced that the Interior Department would initiate organization of a Yurok Tribe.

In December 1978 and March 1979, the Interior Department proposed a set of qualifications for developing a list of persons entitled to vote in the election of an "Interim Yurok Governing Committee" that would draw up a tribal constitution for submission to the voters. 44 Fed. Reg. 12,210 (1979); 43 Fed. Reg. 60,670 (1978). In May 1979, the Department proposed rules for the conduct of this election. 44 Fed. Reg. 31,156 (1979). These proposals engendered considerable opposition by the potential voters. In written comments and at government-sponsored public meetings held on or near the Reservation, they objected to organizing a tribe at all before conclusion of this lawsuit. In spite of these objections, in April and August 1979, the Interior Department published final regulations establishing qualifications for voters, 44 Fed. Reg. 24,536 (1979), and procedures for conducting the election. 44 Fed. Reg. 46,269 (1979). *See* 25 C.F.R. Parts 55, 55a (1980). The Interior Department then circulated nominating petitions and mailed out ballots.

Some of the plaintiffs in this action brought suit against the Secretary of the Interior to enjoin the election. The case was dismissed without prejudice upon the government's agreement not to conduct any election of a temporary or permanent governing body, a constitution drafting committee, or any other body purporting to be representative of the voters, "without first conducting a referendum in accordance with law in which the voters approve of such an election taking place." *Beaver* v. *Secretary of the Interior*, Civ. No. 79–2925 (N.D. Cal., Feb. 11, 1980).

In the ensuing referendum in which the Indians were asked to state whether they favored "establishment of an Interim Yurok Governing Committee," 1,909 voted against it and 65 in favor. All the plaintiffs were eligible to vote in that referendum. *See* 45 Fed. Reg. 49,224 (1980) (to be codified in 25 C.F.R. Part 55b).

B. In May 1979, while the government's efforts to organize a Yurok Tribe were pending, the United States filed a motion to substitute the Yurok Tribe for the 3,800 individual plaintiffs. The theory of this motion is that the Reservation and its resources are tribal property rather than the common property of the individual Indians and that only a tribe composed of non-Hoopa Indians and not any individual Indian has a right to recover the proceeds of the timber sales. The defendant recognizes that there is no existing organizational or functional tribal entity. It urges, however, that the Yurok Tribe has existed for many years as a conceptual entity and suggests that if the motion to substitute is granted, the individual Yurok Indians soon will create an appropriate tribal organization.

The trial judge denied the motion primarily on the ground that all of the issues it raises have been rejected repeatedly during this litigation—and particularly in our 1973 decision.

C. The government argues that substitution of the Yurok Tribe for the individual plaintiffs would not be inconsistent with our 1973 decision because that decision did not determine that any individual Indian could recover, but only that the Square and the Addition are parts of a single reservation, the resources of which the government must use for the common benefit of the Indians of the tribes settled there.

To the contrary, our 1973 decision firmly and unequivocally held that individual Indians are entitled to recover. We explicitly stated that "[s]uch of the plaintiffs as are found herein to be Indians of the reservation will become entitled to share in the income from the entire reservation including the Square . . . ." Fdg. 189, 202 Ct. Cl. at 981. We granted summary judgment for the 22 plaintiffs whom trial had shown to be Indians of the Reservation, ruling that they "are entitled to recover in amounts to be determined under Rule 131(c) . . . ." 202 Ct. Cl. at 873, 486 F.2d at 561; *see* 202 Ct. Cl. at 885, 486 F.2d at 568; fdg. 217, 202 Ct. Cl. at 987. We reaffirmed that holding when we subsequently granted summary judgment for the 121 additional plaintiffs whose status as Indians of the Reservation the government did not challenge. *See supra*, pp. 4–5.

D. Our 1973 decision that the individual Indians are entitled to recover is the law of the case. As we explained in *United States* v. *Turtle Mountain Band of Chippewa Indians*, 222 Ct. Cl. ___, 612 F.2d 517 (1979), *quoted with approval in Northern Helex Co.* v. *United States*, 225 Ct. Cl. ___, ___, 634 F.2d 557, 561 (1980), under that doctrine "as a matter of sound judicial practice, a court generally adheres to a decision in a prior appeal in the same case unless one of three 'exceptional circumstances' exists: 'the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and works a manifest injustice.'" 222 Ct. Cl. at ___, 612 F.2d at 521. The government argues that we should not follow our 1973 decision because it comes within the last exception.

As we pointed out in *Northern Helex, supra,* 225 Ct. Cl. at ___, 634 F.2d at 562, however:

> The standard under this exception is a stringent one. As we stated in *Turtle Mountain Band:* "The purpose of the law-of-the-case principle is to provide finality to judicial decisions. A strong showing of clear error therefore is required before a court should reexamine its decision in the prior appeal." 222 Ct. Cl. at ___, 612 F.2d at 521. A mere suspicion of error, no matter how well supported, does not warrant reopening an already decided point. *See id.* Only if we were convinced to a certainty that our prior decision was incorrect would we be warranted in now reexamining [it].

The government has not made a "strong showing of clear error" in our 1973 decision or "convinced [us] to a certainty" that it was wrong. We therefore decline to reconsider it. Indeed, to the extent that we have reexamined the 1973 decision in reaching this conclusion, we are satisfied that that decision was correct.

In our 1973 decision, we found that the effect of the 1891 Executive Order combining the Square and the Addition "was to create an enlarged reservation in which the Indians of the original reservation and the Indians of the added tracts would have equal rights in common" (fdg. 183, 202 Ct. Cl. at 976), and that "the effect of the executive order of 1891 was that all the Indians of the reservation as thereby extended—Addition and Square—got equal rights in the enlarged reservation . . . ." Fdg. 188, 202 Ct. Cl. at 980. Our ultimate finding was that the government "acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands on the Square." Fdg. 189, 202 Ct. Cl. at 980–81. It follows from that conclusion that individuals whom the Secretary arbitrarily excluded from *per capita* distributions have the right to recover.

Thus, as the trial judge pointed out in his opinion on the political question issue, "this is a case in which claimants are seeking the vindication of individual Indian rights" (slip op. at 17), not of tribal rights. Indeed, despite the existence of the Hoopa Valley tribal organization, the Secretary "disbursed" from the timber receipts "per capita payments to the Indians on the official roll of the Hoopa Valley Tribe . . . ." Fdg. 171, 202 Ct. Cl. at 971. The Secretary thus recognized that payment of the timber revenues on an individual (rather than a tribal) basis was an appropriate method of distribution, and was not in conflict with any concept of tribal ownership of trust-status lands.

Unlike the Hoopa Valley Indians, who had a tribal organization, there was no functioning entity that could have acted for the non-Hoopa Indians of the Reservation either when non-Hoopa Indians filed this suit in 1963, or when we ruled in 1973 that all the Reservation Indians had an interest in all the Reservation property. It was therefore not only appropriate, but necessary, that the present suit be brought by individual Indians.

In sum, the government has not demonstrated any error, let alone clear error, in our 1973 decision that the individual non-Hoopa Valley Indians of the Reservation are entitled to share in the revenues derived from the sale of timber on the Square.

E. The government also urges that substituting the Yurok Tribe for the individual plaintiffs would facilitate the disposition of this case. Assuming, *arguendo*, that this is a valid reason for departing from the law of the case (a highly dubious assumption), the argument is unconvincing.

The government asserts that the substituted Yurok Tribe could continue to prosecute this suit to a quick conclusion and that the money judgment in favor of the Tribe would be distributed, pursuant to the Indian Judgment Funds Distribution Act, 25 U.S.C. §§ 1401, *et seq.*, according to a plan to be formulated by the Secretary of the Interior and supervised by Congress. The government recognizes, however, that there is no functioning Yurok tribal organization. As noted, the Yuroks overwhelmingly rejected the government's attempt to organize a tribe. *See supra*, p. 6. The problems that substitution of such a nonfunctioning entity for the present plaintiffs would create suggest that the more probable effect of the government's proposal would be to delay further rather than to expedite the ultimate disposition of this case.

How would a Yurok Tribe without any functional organization and without tribal leadership conduct the litigation? Who would represent it? Would the tribe retain the lawyers who represent the plaintiffs? Perhaps, but perhaps not. The chaotic situation that the government's proposal would be likely to produce is reminiscent of the government's uncertainty that prompted it earlier in this litigation to insist that all the individual claimants be identified and made parties rather than permitting the suit to proceed in a representative capacity. *See* pretrial conference memorandum of May 31, 1966. Since there is no way of knowing whether the plaintiffs would accept the government's suggested form of tribal organization, what other form that organization might take, or how long such organization might require, substitution hardly seems a promising method of expediting this litigation.

Moreover, the substitution of the Yurok Tribe as the plaintiff would not avoid the need for this court to ascertain who were the Indians of the Addition when the timber proceeds were distributed. Accomplishing the latter objective would require us to overrule a further portion of our 1973 decision and a 1979 decision.

In 1973, we held that each of the Indians of the Reservation was "entitled to share . . . equally with all other such Indians" in the proceeds of the timber sales distributed to individual Indians. Fdg. 189, 202 Ct. Cl. at 981. Several years later, the Hoopa Valley Tribe sought to prevent the government from sequestering 70 percent of the annual timber income pending the final decision in this case, contending that the Indians of the Reservation were entitled to timber revenues "based on [the] respective [population] share of each group in 1891" which was "approximately equal."

We held that the Hoopa Valley Tribe was barred by *res judicata* "from seeking to raise the issues of the ratio of division of revenues between Hoopas and Yuroks . . . ." *Hoopa Valley Tribe* v. *United States*, 219 Ct. Cl. 492, ___, 596 F.2d 435, 447 (1979). We stated that our 1973 decision held that "all the revenues were to be divided by the number of Indians of the Reservation and that the resulting shares were to be those of the individual Indians, respectively." *Id.* at ___, 596 F.2d at 447.

The defendants have not demonstrated that those rulings were erroneous, and we decline to reconsider or change them. The Hoopa Valley Tribe's present contention that the timber sale revenues should be divided 50–50 between the Hoopa Valley and the Yurok Tribes as tenants-in-common does not warrant a change in our previous decisions that those revenues are to be divided per capita among all the Indians of the Reservation.

III.

The Motion to Dismiss

The Hoopa Valley Tribe has moved to dismiss all the individual claims on the ground that they involve nonjusticiable "political" questions. The United States joins in the motion if, as we have done, we reject its motion to substitute. The defendants contend that, under *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), there are no "judicially discoverable and manageable standards"—one of the indicia of a political question—for us to apply in determining who are Indians of the Reservation. Therefore, the argument runs, it is for Congress and the Executive branch, but not for the courts, to make that determination.

In denying the motion, the trial judge correctly pointed out that its substance, although not in its precise present form, had been urged upon us several times in this case, that we have rejected the contention repeatedly, and that the defendants have given no convincing reasons why we should now reach a different conclusion. The trial judge also correctly noted that if the motion raises a new issue, the defendants have not given an adequate explanation for their 17-year delay in filing it. Finally, the trial judge discussed at considerable length the merits of the contention and found them unpersuasive. Although we agree with the trial judge's opinion, we find it necessary to discuss only his first ground of decision, since, in our view, that is dispositive.

As the trial judge pointed out, this is not a new contention. In a motion to dismiss filed in 1963, the government argued that the task of identifying the individuals entitled to share in the timber income was "subject to the plenary power of Congress and . . . not a judicial matter." We denied the motion to dismiss the entire case, but granted it with respect to two of the plaintiffs' claims, which are irrelevant to the case in its present status. *Short* v. *United States*, No. 102–63 (order entered April 24, 1964).

In a joint brief submitted in the 1973 case, the defendants asserted that "the power to determine membership in a tribal entity for the purpose of resolving entitlement to tribal property resides squarely with Congress, or with the tribe, subject to the approval of the Secretary of the Interior." In their exceptions to the trial judge's recommended findings there that 22 specific individual plaintiffs had proved that they were Indians of the Reservation, the defendants stated that, in his recommended decision, the trial judge had "been unable to propose reasonable standards" for determining which of the plaintiffs were entitled to judgments, and urged that "such complex determinations are reserved for administrative officials, such as the Secretary of the Interior . . . ." This contention is virtually identical to the one the defendants now make. In holding that the 22 plaintiffs were entitled to recover, our 1973 decision necessarily rejected that contention.

The Hoopa Valley Tribe asserts that those earlier arguments were directed only to the question of jurisdiction over the subject matter of this suit, but not to its nonjusticiability. The government's petition for certiorari seeking review of our 1973 decision, however, recognized that that decision rejected the assertion that the case was nonjusticiable. Citing *Baker* v. *Carr*, *supra*, the leading decision on the political question doctrine, the petition contended that our 1973 decision "unduly interferes with the authority of the political branches of the government to recognize tribal membership and tribal jurisdiction," which are "question[s] of judgment for the political branches to decide . . . ."

Although there are significant doctrinal differences between jurisdiction and justiciability, the arguments the defendants now make in support of dismissal for nonjusticiability are the same ones they previously made in support of dismissal for lack of jurisdiction. Both arguments essentially are that this case requires the decision of questions within the exclusive province of the political branches of the government. Our prior decisions rejecting those contentions are the law of the case. Here, as in the motion to substitute, the defendants have not shown that our prior decisions were clearly erroneous or, indeed, erroneous at all. To the extent that the defendants argue that the problems that have developed in formulating guidelines for determining who are Indians of the Reservation demonstrate the error of those prior decisions, our discussion in part IV of this opinion (*infra*, pp. 13–16) of the appropriate guidelines shows that there are "judicially discoverable and manageable standards" for deciding this case.

IV.

The Further Proceedings in This Case

This suit was begun in 1963 and, except for cases transferred to us from the Indian Claims Commission, it is the oldest case on our docket. The trial judge has been struggling valiantly, vigorously, and conscientiously for more than seven years to formulate standards for determining who are Indians of the Reservation. Substantial progress has been made, including the filing of detailed personal questionnaires and of voluminous motions for summary judgment with respect to most of the plaintiffs. Unfortunately, the proceedings have been seriously delayed for a number of reasons, over which the trial judge had no control, including the present motions, which have been pending for more than two years.

In his opinion dealing with the political question issue, the trial judge stated that the issue of the standard for identifying Indians of the Reservation is "both difficult and novel" (slip op. at 18), and that "[a]mong the pending matters" on the motions for summary judgment is the question of utilizing "such sources of assistance to the court as the employment of a court-appointed expert and invitations to appropriate organizations to appear as amici curiae on the issue of the appropriate qualifications for an Indian of the reservation." (Slip op. at 19). Those procedures would further delay the case and we see no need to utilize them.

Under our order referring the motions for summary judgment to the trial judge, he ordinarily would initially formulate the standard for determining the Indians of the

Reservation. We have determined, however, that in order to expedite this case, we should now ourselves undertake the task. In doing so, fortunately we need not write upon a clean slate.

The timber revenues that the Secretary distributed to individual Hoopa Indians beginning in 1955 were paid to those persons whom the Hoopa Business Council had determined to be members of the Tribe. In our 1973 decision, we found that the Hoopa Business Council in 1948 undertook to compile "a current roll of the Indians of . . . the Square, for the purpose of controlling the revenues from the resources of the reservation as so defined." Fdg. 136, 202 Ct. Cl. at 959. In determining the membership of the Hoopa Tribe (to whom the Secretary made the payments), the Hoopa Business Council used a detailed and carefully drawn set of standards. We described and explained those standards in the findings in our 1973 decisions. Fdgs. 137–45, 148, 152(c), 155–56, 202 Ct. Cl. at 959–67. The Secretary approved both the Hoopa constitution (which specified the standards for membership in the Hoopa Valley Tribe, fdg. 145, 202 Ct. Cl. at 962) and two schedules which listed most of the Indians who had been determined to be members of the Tribe. Fdg. 153, 202 Ct. Cl. at 964.

Although the situation of the Hoopas and the plaintiff Yuroks may not be precisely the same, we conclude that the standards used to determine the membership of the Hoopa Valley Tribe also provide an appropriate basis for determining which of the plaintiffs are Indians of the Reservation. The timber revenue payments were made to those Hoopas who, on the basis of those standards, had been determined to be Indians of the Reservation as the Secretary then viewed that area, *i.e.*, solely the Square. We held in 1973 that "Indians of the Reservation" were not limited to those of the Square, but also included those of the Addition. The bases that originally were used to determine the Indians of that portion of the Reservation, and which the Secretary of the Interior used in his decision on how to distribute the timber profits for the benefit of the Indians of the Reservation, are no less appropriate to determine the additional persons whom we have held are also Indians of the Reservation.

Indeed, the Interior Department recognized this fact when it attempted to organize a Yurok Tribe. In his message to the Hoopas and Yuroks proposing the organization plan (*see supra*, p. 5), the Assistant Secretary for Indian Affairs stated that the Yurok's "membership standards and criteria" should "[t]o the extent possible . . . be constructed along lines similar to those used during the construction of the membership of the Hoopa Valley Tribe . . . ." *See* 44 Fed. Reg. 12,210 (1979). The Assistant Secretary suggested not only that the Yurok membership roll would be developed according to procedures similar to those used by the Hoopa Valley Tribe, but that similar membership standards would result. He anticipated, for example, "that members of both Tribes will include some Indian people who are not necessarily of Hoopa or Yurok blood."

In any case such as this, where it is necessary to formulate standards for determining the membership of a large class, probably it is impossible to achieve workable and manageable criteria that can be easily applied and that also will produce the correct result in every situation. There is need for some flexibility, so that recognition can be given to the small number of cases in which the standards cannot be strictly applied or in which their strict application would produce manifest injustice. Moreover, there may be differences between the situations of the Hoopas and the Yuroks that necessitate some differences in the standards governing the membership of the two Tribes.

The Hoopa Tribe standards, however, provide an appropriate guideline and basis for determining which of the plaintiffs are entitled to share in the timber payments because they are Indians of the Reservation. Those are the standards the trial judge basically should apply in deciding the question. We leave it to the trial judge's sound discretion to determine what, if any, changes should be made in the Hoopa standards and in the application of the governing standards in individual cases. We have every confidence that the trial judge, with his long experience and complete familiarity with this case, will be able to formulate and apply those standards to produce a just and fair result.

The task the trial judge must perform upon the remand we are ordering will be difficult and time-consuming. We believe, however, that within six months he should be able to render a recommended decision that in a single document will announce the governing standards and apply them to those of the plaintiffs' cases that are ripe for decision. We take comfort from the statements by the plaintiffs' counsel at oral argument that the Hoopa standards would be appropriate to apply in this case and that their use would permit a prompt completion of this litigation.

CONCLUSION

The decisions of the trial judge denying the motions of the defendant to substitute the Yurok Tribe for the individual plaintiffs and of the defendant-intervenor to dismiss the suit are affirmed, and those motions are denied. The case is remanded to the trial judge to issue by April 1, 1982, a recommended decision determining, under standards he will formulate in accordance with this opinion, which of the plaintiffs whose cases are ready for disposition are Indians of the Reservation.

☆ U.S. Government Printing Office: 311-087/32

In the United States Court of Claims

No. 102-63

(Decided October 17, 1973)

JESSIE SHORT, ET AL. v. THE UNITED STATES

Harold C. Faulkner, attorney of record, and *William C. Wunsch*, for plaintiff. *Wallace Sheehan* and *Faulkner, McComish & Wunsch*, of counsel.

Herbert Pittle, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Jerry C. Straus, for Hoopa Valley Tribe, amicus curiae. *Wilkinson, Cragun & Barker*, *Angelo A. Iadarola*, *Richard A. Baenen* and *Alan I. Rubinstein*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*.

OPINION

PER CURIAM: This case comes before the court on defendant's exceptions to a recommended decision filed May 22, 1972, by Trial Judge David Schwartz pursuant to Rule 134 (h). The court has considered the case on the briefs and oral arguments of counsel for the parties and the amicus curiae. The court agrees with the decision as hereinafter set forth, rejects the objections and exceptions of defendant and amicus, and hereby affirms and adopts the decision as the basis for its judgment in this case. Insofar as defendant and amicus curiae have presented arguments to the court which differ from those presented to the trial judge, the court has considered them but does not deem any change in the trial judge's opinion or findings is called for. The court has, however, excised from the findings the trial judge's notes which he indicates were not intended as findings.

Subsequent to the trial judge's decision and the oral argument before the court, the Supreme Court decided *Mattz* v. *Arnett*, 412 U.S. —— (June 11, 1973). We consider the trial judge's opinion and findings, and our decision herein, to be fully consistent with the opinion and decision in that case. Although the ultimate issues in the two cases are different, several aspects of the Supreme Court's opinion tend substantially toward supporting our holding in the present case.

It is concluded, therefore, that certain of the plaintiffs are entitled to recover in amounts to be determined under Rule 131(c), and the claims of the others are set down for retrial, as provided in findings 217–218. The case is remanded to the trial judge for further proceedings. The motion of the Hoopa Valley Tribe to intervene is granted.

OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* In 1876 a 12-mile square tract of land in Northern California, on the last reach of the Trinity River before it joins the Klamath River, was set aside by order of President Grant as the Hoopa Valley Indian Reservation. Most but not all of the Indians of the tract, called the Square, were and have been Hoopa Indians. In 1891 President Harrison made an order extending the boundaries of the reservation to include an adjoining 1-mile wide strip of land on each side of the Klamath River, from the confluence of the two rivers to the ocean about 45 miles away (in consequence of which the reservation took on the shape of a square skillet with an extraordinarily long handle). Most of the Indians of the added tract, called the Addition, were and have been Yurok Indians, also known as Klamaths.

The Square is heavily timbered and in the last 20 years the timber on its unallotted trust-status lands has begun to produce revenues of about $1 million annually. These revenues, administered by the United States as trustee for the Indian beneficial owners, have been divided by the Secretary of the Interior exclusively among the persons on the official roll of the Hoopa Valley Tribe, an organization created in 1950, whose membership rules limit enrollment to allottees of land on the Square, non-landholding "true" Hoopas voted upon by the Tribe, and long-time residents of the Square of a prescribed degree of Hoopa blood, descended from natives of the Square.

The plaintiffs are 3,323 Indians, in the main Yuroks of the Addition and their descendants, who are ineligible for membership in the Hoopa Valley Tribe and have thus been denied a share in the revenues from the Square. They bring this suit against the United States as their trustee for a money judgment for their alleged share in the timber income, claiming it as all-reservation property. The Hoopa Valley Tribe, in a sense the real party defendant, is present in the case as an amicus curiae aligned with the defendant; the position of the Government and the Tribe are identical and the two have filed joint briefs. (References to defendant or to the Government will therefore mean the Hoopa Valley Tribe as well.)

To simplify the litigation, the cases of 26 plaintiffs believed to be representative of the 3,323 were chosen for trial with the expectation that if the plaintiffs as a group were upheld on the common issue, resolution of the sample cases would develop standards by which the parties could dispose of many or most of the remaining cases. The first order of business is therefore the basic issue of whether the Indians of the Addition may be excluded from sharing in the revenues of the communal lands of the Square.

The history of the reservation may be succintly stated: It was established in 1864 pursuant to the Act of April 8, 1864, 13 Stat. 39, its boundaries were in 1865 provisionally determined to be what has since been called the Square, formally so defined by an order of President Grant in 1876 and extended to include the Addition by order of President Harrison in 1891. The act of 1864 is the basis of the claims of all parties. No claim is made of any title or right antedating or overriding the statute or the authority exercised thereunder.

The plaintiffs contend that as Indians of the Addition, they are entitled to share in the resources of the entire reservation, including the Square. The enlargement of the reservation in 1891 formed, they maintain, a single, integrated reservation to which all the Indians on both the Square and the Addition got equal rights in common. The contrary position of the Government is that the Square survived the enlargement of the reservation in 1891 as an entity whose resident Indians had vested substantive rights, exclusive as against the Indians of the Addition. The executive order of 1891, the Government says, joined the Square and the Addition for administrative purposes only, not for purposes of substantive rights, and without effect on already vested rights of the Indians of the Square, now organized as the Hoopa Valley Tribe. The controversy is decided here in favor of plaintiffs, for the reasons which follow.

On August 21, 1864, Austin Wiley, the federal Superintendent of Indian Affairs for California, in a public notice "located" a reservation, to be called the "Hoopa Valley Reservation," "situated" on the Trinity River in Klamath County.[1] A second notice in February of the following year defined the boundaries of the "Hoopa Reservation" as a square tract bisected by the last 12 miles of the Trinity River before its junction with the Klamath and extending 6 miles on each side of the Trinity.[2] Eleven years later, on June 23, 1876,

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[1] "By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington City, D.C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity River, in Klamath County, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct."

"AUSTIN WILEY,

"Superintendent Indian Affairs for the State of California

"FORT GASTON, CAL., *August 21, 1864*"

[2] *"To Whom It May Concern:*

"Be it known that by virtue of power vested in me by Act of Congress passed April 8th, 1864, and acting under instructions from the Department of the Interior, I have located and set aside for an Indian Reservation the following described tract of land to be known as the Hoopa Reservation: Beginning at a point where Trinity River flows into Hoopa Valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath River, as will be more particularly described by a map of said Reservation.

"Notice is hereby given to all persons not to settle or improve upon said Indian Reservation excepting as the Agent in charge may permit and in no manner to trespass thereon or interfere therewith.

President Grant in an executive order precisely defined the "exterior boundaries" of the "Hoopa Valley Indian Reservation" in accordance with a survey, and declared that the 89572.43 acres embraced therein were "set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864." [3] The circumstances surrounding the establishment and enlargement of the reservation are described in the accompanying findings of fact.

Neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian tribe by name, nor intimated which tribes were occupying or were to occupy the reservation. In this they were consistent with the statute whose authority was being exercised, the Act of April 8, 1864, 13 Stat. 39. That act, cited by both public notices and by the executive order, authorized the President in his discretion to locate not more than four Indian reservations in California, at least one of them to be in the northern district of the state, of such extent as he deemed suitable for the accommodation of the Indians of the state, all without mention of any tribe by name.

Section 2 of the act read as follows (13 Stat. 40):

> Sec. 2. That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land,

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"Free transit through the Reservation will be permitted all travelers, pack-trains and stock, subject to such restrictions as the local Agent may see proper to impose.

"AUSTIN WILEY,
"Supt. Ind. Aff's, Cal."

"HOOPA RESERVATION, CAL.
"February 18th 1865."

[3] "EXECUTIVE MANSION,
"June 23, 1876

"It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: 'Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H. V. R., No. 3': thence south 17½ degrees west, 905.15 chains, to southeast corner of reservation; thence south 72½ degrees west, 480 chains, to the mouth of Trinity River.' be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)"

"U.S. GRANT"

> within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: * * * *And provided*, *further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

The powers conferred by this statute are to be construed in keeping with the broad connotations of the words employed: "at his discretion," "suitable extent," "accommodation of the Indians," "practicable" and "due regard." *South Puerto Rico Company Trading Corp.* v. *United States*, 167 Ct. Cl. 236, 260–61; 334 F. 2d 622, 631–32 (1964), *cert. denied*, 379 U.S. 964 (1965). It is not disputed that the President had complete discretion as to which tribes were to be located on any of the reservations. The number of the tribes to occupy a reservation was also a matter for Presidential decision. There were many Indian tribes in California; in the north, in the area of the Hoopas and the Yuroks, almost every river and creek had its own tribe. Since there were to be no more than four reservations in the state—less, if the President so decided—it was inevitable that each reservation could and almost certainly would be occupied by more than one tribe. How many tribes was left to the President; the President would in his discretion adjust the size of a reservation to the number of tribes and Indians to be accommodated.

Given such a statutory scheme, faithfully reflected by the omission of reference to any Indian tribe in the notices of 1864–65 and the executive order of 1876, the Hoopa Indians could get no vested or preferential rights to the Square from the fact alone of being the first or among the first to occupy the Square with Presidential authority. The sequence in which tribes were authorized to occupy a reservation gave no rights. Any exercise of the President's discretion in favor of the Hoopas, in approving their residence on the reservation, gave the Hoopas no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Healing* v. *Jones*, 210 F. Supp. 125, 138, 153, 170 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963); *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 278 (1935).

It is claimed by defendant, however, that the Hoopas were the sole aboriginal occupants of the Square. The legal consequences were this claim upheld, as against the statute and the President's authority, need not be gone into, for the claim of fact is unfounded. The accompanying findings recount that the Hoopas shared the Square with at least some Yuroks, whose native villages ranged along the Klamath River from the ocean to the Trinity—the area later to become the Addition—to the banks of the Trinity near the Klamath. This conclusion of fact as to the presence of Yuroks on the Square prior to white settlement does not, of course, support the claim of the present plaintiff Yuroks of the Addition, who were not introduced into the reservation until 1891, but it does negate the claim of the defendant insofar as it is based upon original exclusive Hoopa occupancy of the Square.

Another contention is that vested rights in the Square were conferred upon the Hoopas under a treaty made by Wiley at the time he established the reservation in 1864. This treaty, which made peace with the Hoopas and several other tribes then at war with the United States, obligated the United States "to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa Valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes." It is conceded that this promise was not a treaty in the constitutional sense. Its making was not authorized, and it was not ratified. Its text is found as an attachment to a report by Wiley printed in the annual report for 1864 of the Superintendent of Indian Affairs; it is there captioned "Treaty of peace and friendship between the United States government and the Hoopas, South Fork, Redwood, and Grouse Creek Indians."

Putting aside any question of the binding quality of this document, it is not properly to be read as having sought to restrict the President's discretion under the act of 1864 or to give rights in the reservation to some tribes and withhold them from others. Within the week of the making of the treaty, Wiley in his first public notice locating the "Hoopa Valley Reservation" described the reservation only as an "Indian reservation" without any reference to who should occupy it. In the setting in which the treaty was presented to the Indians who agreed to it, described in the accompanying findings, the treaty is properly to be construed as a promise to devote Hoopa Valley to an Indian reservation for those tribes that would cease their hostilities and live at peace with the United States. So understood, the Klamaths or Yuroks were among its beneficiaries, for they laid down their arms and thenceforth remained at peace with the United States. There is good ground for concluding that though the caption of the treaty did not mention the Klamaths (Yuroks) as original parties, they were entitled to its benefits as among the tribes to whom the treaty was in fact presented and who were thereby persuaded to lay down their arms.

It is perfectly plain that from the outset in 1864 all involved understood that the reservation was intended for an undetermined number of tribes including the Hoopas and the Klamaths, and that the authorities repeatedly acted on this assumption. Some Yuroks already lived in the Square in 1864 and others were soon settled there, according to the best data on the peoples of the reservation. Within a fortnight of his first notice locating the reservation, Wiley reported the precise names of the tribes occupying every reservation in California except the Hoopa Valley Reservation; the Hoopa Valley Reservation, he said, contained "Various tribes." Soon thereafter Hoopas, Klamaths, and Redwoods appear as residents of the reservation. Saiaz, Wiyot, Wylackie and Sinkyone Indians were moved to the reservation from elsewhere (and apparently did not remain, at least identifiably). In 1869 Wiley's successor had a plan (not executed, for reasons which do not appear) to move 1800 Klamath Indians to the reservation. The Klamath River Reservation (occupied by Yuroks and constituting the ocean end of what later became the addition to the Hoopa Valley Reservation) had been destroyed by flood in 1861, and efforts to resettle its Indians, Yuroks, had not been successful. The 1800 Klamaths were thus probably the forebears of the present plaintiffs.

The annual report of the Commissioner of Indian Affairs for 1872 stated that the Indians in the care of the agency at Hoopa Valley were the Humboldts (Wiyots and others), Hoonsoltons, Miscolts, Saiaz and several other bands, numbering 725. The reservation on the Trinity, the Commissioner said, "was set apart per act of April 8, 1864, for these and such other Indians in the northern part of the State as might be induced to settle there." And in the years between the executive orders of 1876 and 1891 the Commissioner's annual reports contained a table giving the names of the tribes "occupying or belonging" to the various reservations. For the Hoopa Valley Reservation, the tribal names given were Hunsatang, Hoopa, Klamath River, Redwood, Saiaz, Sermalton, Miskut and Tishtanatan. During all these years, therefore, it was well understood that the reservation contained several tribes and was intended for whatever tribes might be settled there by authority of the President.

When, therefore, President Harrison by executive order of October 16, 1891 extended the boundaries of the reservation to include the contiguous strip of land along the Klamath River, there were no vested rights to the Square incapable of divestment, or at least dilution, by a Presidential introduction of additional tribes into the reservation. There could be no such rights in view of the President's authority under the act of 1864 and the manner of its exercise to that time.

The terms of the executive order (text in the note [4]) described the reservation as created under the act of 1864, and "extended" its "limits" "so as to include" the tract since called the Addition. No qualification was imposed on the incorporation of the Addition into the reservation, except that tracts on the Addition privately owned under the land laws were "excluded from the reservation as hereby extended."

Such words in an executive order, in this respect no different than the statute by whose authority it was made, are "to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (*Miller* v. *Robertson*, 266 U.S. 243, 250 (1924))." No reason to the contrary appearing, the order is to be given its natural effect of granting to the Indians of the Addition, as Indians of the enlarged reservation, rights in the reservation equally with the Indians of the Square.

The order has been held to be a lawful exercise of the President's "continuing authority," under the act of 1864, within his "large discretion" concerning the exercise of that authority, to "alter and enlarge" the reservation "from time to time in the light of experience." *Donnelly* v. *United States*, 228 U.S. 243, 256–57 (1913). The President had no less power to enlarge a reservation created under the act of 1864 than he had to locate it originally. Five prior Presidents—Presidents Grant, Hayes, Garfield, Arthur and Cleveland—the Supreme Court noted, had made similar orders, with respect to the reservations authorized by the act, "altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made and establishing others in their stead; and in

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"EXECUTIVE MANSION, *October 16, 1891*"

[4] "It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorised to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended."

"BENJ. HARRISON"

numerous instances Congress in effect ratified such action." *Donnelly* v. *United States, supra* at 258.

As already noted, the plain and natural consequence of the order was the creation of an enlarged, single reservation incorporating without distinction its added and original tracts upon which the Indians populating the newly-added lands should reside on an equal footing with the Indians theretofore resident upon it. This the President was as free to do under the reserved powers granted him by the act of 1864 as he had been free in the early years, without enlarging the reservation, to settle Redwoods, Saiaz and others and as he would have been free in 1869 to settle upon the reservation the Yuroks of the Klamath River Reservation. In introducing the Yuroks of the Addition into the enlarged reservation in 1891, on a basis of equality with their kinsmen and the several other tribes already there, the President was merely continuing to accommodate the tribes of the area in the Indian reservation in Northern California he had established under the act of 1864. Compare *Halbert* v. *United States*, 283 U.S. 753 (1931) and *Quinaielt Tribe* v. *United States*, 102 Ct. Cl. 822 (1945), on the President's power to enlarge a treaty reservation for the common benefit of the tribe originally settled there and tribes "in that locality."

Although the purpose of the executive branch in enlarging the reservation would seem to be apparent from the facts, the defendant reaches a different result entirely; it contends that the purpose of the executive order was to join the parts of the enlarged reservation only technically, for administrative purposes only, the Indians of each tract to retain their rights in their respective tracts. No hint of such a purpose appears on the face of the executive order. And no support for such purpose appears in the data said by defendant to prove it—the background and origins of the executive order and of legislation affecting the Klamath River Reservation, a part of the Addition. An exhaustive inquiry into the data, set out in detail in the accompanying findings, fails to reveal even a mention of such a purpose as defendant asserts, much less the compelling showing which would be required to curtail the ordinary consequences of the executive order.

The executive order originated in the Administration's desire to give reservation status to the Connecting Strip and the Klamath River Reservation, the latter then recently held by the courts to be an abandoned Indian reservation and threatened by Congress with a bill for its public sale. The object was to provide the legal basis for expulsion of white traders from the area and for the allotment of land in severalty to the Indians of the area, under the General Indian Allotment Act of February 8, 1887 as amended (24 Stat. 388, 26 Stat. 794). Any qualification on the incorporation of the Addition into the reservation would have jeopardized the desired status, for only four reservations were permitted in California under the act of 1864 and four were already in existence. Full reservation status could come only from a bona fide merger of the Addition into the reservation, not a "technical" joinder, "for administration only," of a reservation with a dubious status to one of lawful status. In the enlarged reservation resulting from such a merger, there could be only equal rights for all Indians of the reservation.

Administrative opinions, in the years following the executive order of 1891, recognized both that a number of tribes including Klamaths, Hoopas and other tribes were entitled to rights on the reservation and, with pointed relevance to the instant case, that the Indians of the Addition and the Square were equal in respect to rights in the lands of the Square. These opinions are described in the accompanying findings. In one of them, in 1916, it was ruled that the Hoopas, Klamaths and several other tribes were entitled to rights on the reservation. In another, in 1933, it was determined that allotments of land on the Square should cease, and assignments of land contingent on cultivation be substituted, because, it was held, the Indians of the Addition and the Square were equally entitled to allotment of lands and there was insufficient land for all those entitled.

Defendant attacks these rulings as erroneous, as made by men of lesser rank and as covering only a short span of years. The rulings were sound, they were made by, among others, a Commissioner, a Chief Clerk of the Indian Office in 1916 (then the officer third in rank, next after the Assistant Commissioner), and they were made whenever there was need for them. No contrary ruling worth the mention was made in the Department of the Interior until the Secretary in 1955 began to pay the income from the Square to the Hoopa Valley Tribe and the Deputy Solicitor in 1958 wrote an opinion justifying the legality of his action. 65 Dec. Int. Dept. 59 (1958). That opinion is not supported by the defendant; the opinion does not reflect the facts found here, primarily the nonexclusive nature of the Hoopas' residence in the Square, and it proffers neither tangible support nor rational theoretical basis for its assertion that the executive order of 1891 was intended only for administrative convenience.

The baseless belief that the Indians of the Square had exclusive rights in the lands of the Square seems to have grown from the remoteness of the Addition from the Square, the roughness of the terrain of the former, and the different stock of their respective inhabitants. The error flowered during the inordinate delay—from 1894 to 1922—between the time of allotment of Addition lands and allotment of land on the Square. The Indians of the Square, deprived for so long of allotments, became understandably jealous and possessive for the entire Square.

The 1891 executive order, however, withstands all attacks. It was fully authorized by the act of 1864. No vested Indian rights in the Square existed, and the effect of the order was to enlarge both the area and the population of the reservation, without any limitation on the rights of all the Indians in the communal lands of the enlarged reservation.

Turning to the cases of the 26 individual plaintiffs, stated in detail to the findings, it appears that 22 of them, named in the accompanying ultimate findings and conclusions, are sufficiently proven to be Indians of the reservation to warrant a determination now that they are entitled to recover, in amounts to be calculated after all the 3,323 claims are tried and determined. In the cases of the remaining four, there are questions—of possible loss of reservation rights or of degree of Indian blood—as require that their cases be retried or rebriefed, as seems indicated in each case. With the common issue of exclusive right out of the way, the parties through their counsel will presumably be able to address themselves to the individual claims, and agree upon standards for the recognition of individual claims. There should be no reason to insist upon a formal appearance by each claimant in court. Sworn testimony may be given by affidavit or in the equivalent of a deposition, followed by stipulation for judgment where no contest is planned.

FINDINGS OF FACT*

1855–64—The Klamath River Reservation

1. On November 16, 1855 the President directed that there be set aside in Northern California, as the Klamath River Reservation, "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River" for a distance of approximately 20 miles, not to exceed 25,000 acres.

The President acted pursuant to the Act of March 3, 1853 (10 Stat. 226, 238), as amended March 3, 1855 (10 Stat. 686, 699), which authorized the creation of seven military reservations in California or in the Territories of Utah and New Mexico.

2. In Northern California the Klamath River first flows southwest to its junction with the Trinity River (which flows north and is essentially a branch of the Klamath) and then, veering sharply to the northwest, continues to the ocean. The two rivers thus form a Y whose arms are the Klamath and whose trunk is the Trinity. The Klamath River Reservation, on the upper half of the Y's left arm, extended upstream, from the ocean, for half the distance of the left arm to about 25 miles from the junction of the two rivers.

3. At the time of its creation in 1855, the Klamath River Reservation was occupied by about 2,000 Indians of the Yurok tribe, also known as Klamaths.

"Klamath," the name also of a more northerly group of Indians in Oregon, is as used herein and in the documents considered herein the name of the Indians resident, generally speaking, in the basin of the Klamath River in Northern California.

4. The tribe of Klamaths living down river on the Klamath were the Yuroks. Yurok means down river. Those living up river (roughly speaking beyond the Trinity's junction with

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*Findings are grouped and titled for convenience; neither placement nor title affects the findings, and a title does not necessarily describe all the findings which follow.

the Klamath) were the Karoks. Karok means up river. Sometimes Yuroks are called Lower Klamath Indians, the adjective "lower" meaning they live below the junction of the two rivers.

The Indian tribes of Northern California were not organized or large entities; Indians resident on a particular river or fork were a "tribe." Tribal names were often applied inexactly and usually meant only a place of residence. To call an Indian a "Hoopa" or a Trinity Indian meant he was an Indian resident in the valley of the Trinity called Hoopa. The names "Yurok" and "Karok," as seen above, also meant a place of residence.

"Hoopa" is used herein instead of its other forms, "Hupa" and "Hoopah." References to Hoopas and the Hoopa tribe should be distinguished from the membership of the Hoopa Valley Tribe, the amicus curiae, an organization created in 1950 with intricate membership rules.

5. The native villages of the Lower Klamaths or Yuroks were located on the Pacific coast from Wilson Creek, north of the mouth of the Klamath, to Little River, south of the Klamath, along the Klamath River from its mouth to Bluff Creek, located a short distance upstream from the Klamath-Trinity junction, and (of particular significance in this case) in the canyon of the Trinity River in the most northerly part of the river near the junction of the Trinity with the Klamath and in a village a small distance from the Trinity.

6. The native villages of the Upper Klamath Indians of Karoks were along the upper Klamath, from a point just above Bluff Creek, upstream to Indian Creek. Weitchpec, a village at the junction of the two rivers, is often treated as the dividing point, and is allotted to the Yuroks.

7. Following the creation of the Klamath River Reservation, Indians of other tribes were moved to the reservation, among them 500 Tolowa Indians brought in 1856 from their native territory on the Smith River near the Oregon border. By 1858, a large majority of these Tolowas returned to their former territory.

8. In 1861, the Klamath River Reservation was flooded, and nearly all the arable land was destroyed. The Superintendent and a number of the Indians of the reservation moved to the Smith River Indian Reserve on the Smith River

near the Oregon boundary. Since the Klamaths lived principally on the salmon in the river, a substantial or greater number of them refused to leave and remained in the area and in the area further up river. Many of those who moved to the Smith River Reservation soon or eventually returned to their former territory on the Klamath.

9. Because the following findings turn away from the Klamath River Reservation to the establishment of the Hoopa Valley Reservation and do not return to the Klamath River Reservation until 1891, a brief foresight is given: Those Indians who remained on the Klamath River Reservation eventually came under the supervision of the Indian Agency for the area, located at the Hoopa Valley Reservation on the Trinity River southward from its junction with the Klamath, after that reservation was provisionally located in 1864. Thereafter, in 1891, the Hoopa Valley Reservation was enlarged, by executive order, to include not only the Klamath River Reservation but the connecting strip of land along the Klamath River between the two reservations.

The Act of April 8, 1864

10. The Act of April 8, 1864 (13 Stat. 39), the source of all claims herein and of central importance in this case, authorized the President in his discretion to set aside "not exceeding four tracts of land" within the State of California, at least one of them to be in the northern district, "for the purposes of Indian reservations," to be located "as remote from white settlements as may be found practicable." The reservations were to be "of suitable extent for the accommodation of the Indians of said state" and they were to include, in the President's discretion, any existing Indian reservations, "enlarged to such an extent as in the opinion of the President may be necessary." The remaining several reservations in California were to be surveyed into lots and offered for public sale.

The text of the relevant portion of the Act is as follows (13 Stat. 40):

> Sec. 2. *And be it further enacted*, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes

> of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: *And provided, further*, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose: *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent, as in the opinion of the President may be necessary, in order to its [sic] complete adaptation to the purposes for which it is intended.
>
> Sec. 3. *And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the commissioner of the general land-office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe: * * *

11. Shortly after the passage of the act, Austin Wiley, already in the service of the Indian Bureau in California, was appointed Superintendent of Indian Affairs for California and directed to give his immediate attention to the matter of the location of the four reservations authorized by the act, so that the Department of the Interior could have the benefit of his judgment in making the locations.

First Location of a Reservation in Hoopa Valley

12. At that time a number of Indian tribes of Northern California had for some years been at war with the forces of the United States. Many Indians had been taken prisoner. Other warriors, headquartered in Hoopa Valley, were willing to surrender. On his appointment Wiley proceeded to Hoopa Valley, treated with the tribes there represented, and there located a reservation by the public notice set out in the following finding.

13. On August 21, 1864, Superintendent Wiley gave public notice that he had located an Indian reservation, to be known as the Hoopa Valley Reservation, on the Trinity River in Klamath County, California, the boundaries to be thereafter prescribed.

The notice in its entirety read as follows:

> By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington city, D.C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity river, in Klamath county, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States.
>
> Settlers in Hoopa valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.
>
> AUSTIN WILEY,
> *Sup't Indian Affairs for the State of California.*
> FORT GASTON, CAL., *August 21, 1864.*

14. The Klamath County of that day, in which the new reservation was located, has since been largely added to present-day Humboldt County. Irregularly shaped, it included the area north and south of the Klamath above its junction with the Trinity and stretching eastward to the Salmon River, the area north and south of the Klamath below its junction with the Trinity to about the beginning of the Klamath River Reservation, and the territory contained within a line drawn along the Klamath for the extent of the Klamath River Reservation, then going southward along the coast to about the mouth of the Mad River, then going due eastward to about the southerly point of the Hoopa Valley Reservation and then, irregularly, going further east. See the map entitled *Colton's California*, published by J. H. Colton, 1864, available at the Library of Congress.

In terms of the Y mentioned above, Klamath County included the territory west of the left arm and trunk, to the ocean, the territory east of the right arm and trunk, to beyond the Salmon River, substantial territory north of the Y's right arm, and north of its left arm to the inland end of the Klamath River Reservation. The county thus included a great part of the native territory of the Klamath Indians (see findings 5, 6, *supra*).

The "Treaty" Made in Hoopa Valley in 1864

15. A "treaty" made by Wiley with the Indian tribes at the time he located the reservation appears as an attachment to a report Wiley wrote on August 29, 1864, some days after his public notice. The report and the attached documents are set out as they appear in the annual report of the Commissioner of Indian Affairs for 1864:

> OFFICE OF INDIAN AFFAIRS,
> *San Francisco, California, August* 29, 1864.
>
> SIR: On the 2d ultimo I informed you that I would start for the north for the purpose of making some kind of a settlement with the hostile Indians in the Humboldt military district. The headquarters for the Indians who have been engaged in the war in that portion of the State for five years past is Hoopa valley, on the Trinity river. I arrived there on the 10th ultimo, and found most of the hostile Indians in the valley, with their guns still in their hands, waiting my arrival.
>
> They had been induced to come in by the officers commanding the district, under promise of protection until

terms could be arranged; but so cunning were they, and so suspicious of white men, that they kept most of their guns hid, and were constantly on the alert, ready to break to the mountains in case any effort should be made to remove them to a reservation. They protest that they prefer death or starvation in the mountains to removal.

I found among the leaders, and those having the most influence, young men, those that I had known as boys, most of whom have had more or less experience among white men as packers, herdsmen, farmers, &c. They all speak English and are intelligent. They make dangerous enemies, but I have every reason to believe they will comply with every obligation they have subscribed to if I keep my faith with them. The old Indians used their influence against giving up guns, and protested that I would lie to them, as other agents had done; but the influence is now all in the hands of the younger or "second crop" Indians. They are the ones to be conciliated; peace with them secures peace with all. Enclosed you will find copy of a treaty I proposed, and which they finally accepted. From the 16th to the 21st they were busy in delivering up their guns and pistols, many of them being hid out miles from the valley. On the 22d I issued the notice marked B, called a meeting of the settlers, and made known to them what terms I had offered the Indians to secure peace. They were all well satisfied, with, perhaps, the exception of two or three whose associations have been exclusively among the Indians. Several of the settlers will leave their places this fall, trusting to the government to pay them for their improvements.

The title to the whole of the lands in the valley is vested in the government, and as the improvements only are to be purchased, a very large sum will not be required. A good flouring mill and a fine saw-mill are there. The valley is beautifully located, surrounded by high mountains, well watered, with land enough in cultivation to feed all the Indians that are there or that may come there. Trinity river affords them fish during the spring and fall season, and the mountains on either side abound with acorns, berries, seed, &c.

At present there are about six hundred Indians in the valley. I appointed L. C. Beckwith a temporary special agent there at the request of the Indians themselves. I authorized him to assist them in building new houses, (their old ones having been burned during the war,) and to incur such expense as was absolutely necessary in preparing shelter for them before winter set in.

Enclosed please find a rough sketch of the valley; which, without being accurate in detail, will give you some idea of its situation and the location of the improvements.

I propose to take the whole of the valley and to the summit of the mountains on each side, which is about five miles. There are no improvements upon the proposed reservation excepting those within the valley.

I trust my action will be approved, and that no time will be lost by the department in having the improvements appraised. We shall want to commence ploughing there in November for our next year's crop, and the sooner the citizens and Indians know that the valley is to be the property of the latter, the better it will be for all concerned.

Soliciting your earliest attention to this matter, I remain, very respectfully, your obedient servant,

AUSTIN WILEY,
Superintendent of Indian Affairs, California.

Hon. WILLIAM P. DOLE,
Commissioner.

Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians.

ARTICLE I.

Sec. 1. The United States government, through Austin Wiley, superintendent of Indian affairs for the State for California, by these presents doth agree and obligate itself to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes.

Sec. 2. Said reservation shall include a sufficient area of the mountains on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, &c.

Sec. 3. The United States government shall provide suitable clothing and blankets for the men, women, and children, which shall be distributed each year by the agent in charge.

Sec. 4. Suitable instructions shall be given the squaws to enable them to make their own clothing, take proper care of their children, and become generally efficient in household duties.

Sec. 5. An agent and a sufficient number of employes to instruct the Indians in farming and harvesting shall be appointed, to reside upon the reservation, and no other white men shall be permitted to reside upon said reservation, except such as are in the military service of the United States or employed in government service.

Sec. 6. A physician shall be appointed to reside upon the reservation, whose duty it shall be to minister to the wants of the sick and look to their health and comfort.

ARTICLE II.

Sec. 1. All Indians included among those subscribing to this treaty must obey all orders emanating from the agent in charge.

Sec. 2. No Indians belonging to either of the tribes herein enumerated shall go beyond the limits of said reservation without a written pass from the agent in charge. All so offending shall not be deemed friendly, and shall be hostile Indians.

Sec. 3. All Indians who have taken part in the war waged against the whites in this district for the past five years shall be forgiven and entitled to the same protection as those who have not been so engaged.

Sec. 4. All guns and pistols shall be delivered to the commanding officer at Fort Gaston, to be held in trust by him for the use and benefit of the Indians, to be used by them in hunting only, in such numbers and for such length of time as the agent may direct. All ammunition in their charge to be turned over to the agents and paid for at its actual value in Indian money.

INDIAN RESERVATION NOTICE.

[There followed the text of the notice of the location of the Hoopa Valley Reservation, which appears in finding 13, *supra.*]

16. Commissioner W. P. Dole responded to Wiley's letter (foregoing finding) on October 3, 1864 as follows:

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, October 3, 1864.

SIR: Your communication, dated August 29, 1864, enclosing a draught of the agreement made by you with the lately hostile Indians of the Trinity river, with the sketch of the situation of and settlements in the Hoopa valley, and the notice issued by you to the settlers, under date of—, is received and duly considered.

From your description of the valley thus selected for a reservation, its fertility, and consequent capability to sustain the people proposed to be placed upon it, its isolation from the white settlements, and the willingness expressed by the Indians to acquiesce in the arrangements, and confine themselves to the locality selected, I am induced to approve of your action, and trust that great good will result to the Indians, as well as to the whites, by this close of an expensive course of hostilities, and the consequent concentration of the Indians at a point where they can be controlled, and where measures may be adopted to improve their condition. I return herewith a copy of the agreement, as forwarded by you, with certain additions, suggested by the Secretary of the Interior, the document in this amended form meeting with his approval.

The relations of the government of the United States to the Indians of California do not contemplate treaties with those Indians, to be submitted by the President to the Senate for confirmation; but as it is deemed advisable to have the chiefs and leading men of the tribes in question subscribe their hands to a document which shall fully commit them hereafter, you will, after explaining to them the nature of the additions or alterations now suggested, as being intended solely for their benefit, cause a copy to be signed by them, and forward it to this office.

* * * * *

The establishment of the Hoopa Valley reservation, if approved, of course contemplates the abandonment of that at Mendocino, as but four are authorized, and it is understood from your communication of later date than the one to which this is a special reply, that the Indians upon the latter reservation are to be removed this fall to Round valley.

You will please take special care in the description of the boundaries of the proposed reservation at Hoopa valley, so that its proper limits may be of record in this office and the General Land Office, when approved by the President of the United States.

Very respectfully, your obedient servant,
W. P. DOLE, *Commissioner.*

AUSTIN WILEY, Esq.,
Sup't Indian Affairs, San Francisco, California.

17. It is conceded that Wiley's "treaty" (finding 15, *supra*) was not ratified. (Even agreement is doubtful. No signatures by Indians appear (foregoing finding), and it has not been shown that the Commissioner's desired amendments (foregoing finding) were ever made known to any Indians or approved by them. In a public notice, however, Wiley said that the treaty stipulations were "confirmed" on February 8, 1865.)

18. From Wiley's letters, reported in the Commissioner's report for 1864 (which is the "Indian Report, 1864" and the source of all the page references mentioned below), it appears that

(a) The Klamath Indians were among the Indians at war with the forces of the United States. ("[T]he Klamath and Hoopa or Trinity Indians were at war with the forces of the United States at the time of the passage of the act of 1864, and had been so for some years. Indian Report, 1864, pp. 123, 127, 130, 133, 134–138." *Donnelly* v. *United States*, 228 U.S. 243, 257 (1913).)

In one of Wiley's letters, he referred to the "Klamath, Redwood and Trinity Indians, with whom we are now at war." P. 125; see also pp. 120–21. In other letters he wrote of the war with the Indians of Humboldt, Klamath and Trinity counties (pp. 116, 130). The Indians of Klamath County were surely the Klamath Indians (see findings 3, 5, 6, 14, *supra*), and it therefore appears that Wiley doubly referred to the Klamath Indians, both as "Klamath" Indians and as the Indians of Klamath County.

(b) The warring Indians who had not been taken prisoner had made their headquarters in Hoopa Valley; they were ready to surrender. Pp. 130, 131, 133, 134.

(c) Wiley went to Hoopa Valley, treated with the various tribes be found there, persuaded them to accept his "treaty," established a reservation and thereby brought to an end the war with the Indians of Humboldt, Klamath and Trinity counties (pp. 116–117, 119), who, as noted above, included the Klamaths.

(d) From the foregoing it follows and is found that despite the caption of the "treaty," describing it as made with the "Hoopa, South Fork, Redwood, and Grouse Creek Indians" (finding 15, *supra*), the tribes with whom it was made included the Klamaths.

(e) A reservation to be shared by Hoopas and Klamaths was not an unfamiliar idea. A treaty concluded in 1851 with bands of Indians of those tribes (but not ratified) would have created such a reservation of a tract which in substantial part coincided with what eventually became the Hoopa Valley Reservation.

19. After 1864 the Klamaths lived in peace in and in the area of the Klamath River Reservation, in their villages on the Trinity near the Klamath, on the connecting strip of land between the two reservations, and elsewhere. It follows, therefore, that even if the Klamaths were not originally among the tribes with whom Wiley made his treaty, they availed themselves of its benefits within the intendment of its Article I, Section 1 (finding 15, *supra*), and thereby became entitled to its benefits.

20. With his letter annual report of September 1, 1864 Wiley enclosed a tabular "Report of Indians on the reservation within the California superintendency, September 1, 1864," containing the name of the reservation, names of tribes, and numbers of Indians, male, female and total. For each of the four reservations other than Hoopa Valley he listed the names of tribes occupying the reservation. For Hoopa Valley, he reported "Various tribes, about 600," giving no tribal names and no numbers for male and female.

1865—The 12-Mile Square as the Boundary of the Hoopa Valley Reservation

21. Wiley's first notice had given no hint of the size of the reservation he had "located"; the notice had said that the reservation, which he called the "Hoopa Valley Reservation," was "situated on the Trinity River, in Klamath county, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President" (finding 13, *supra*).

Wiley's second public notice, on February 18, 1865, read as follows:

> *To Whom It May Concern:*
>
> Be it known that by virtue of power vested in me by Act of Congress passed April 8th, 1864, and acting under instructions from the Department of the Interior, I have

located and set aside for an Indian Reservation the following described tract of land to be known as the Hoopa Reservation: Beginning at a point where Trinity river flows into Hoopa valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath river, as will be more particularly described by a map of said Reservation.

Notice is hereby given to all persons not to settle or improve upon said Indian Reservation excepting as the Agent in charge may permit, and in no manner to trespass thereon or interfere therewith.

Free transit through the Reservation will be permitted all travelers, packtrains and stock, subject to such restrictions as the local Agent may see proper to impose.

AUSTIN WILEY,
Sup't Ind. Aff's, Cal.

HOOPA RESERVATION, CAL.,
February 18th, 1865.

(No such map as is mentioned in this notice has been referred to by the parties.)

In the first notice (finding 13, *supra*) Wiley had called the reservation the "Hoopa Valley reservation." According to a letter he wrote (on August 2, 1864) about the time of the first notice (August 21, 1864) he was then thinking of an area about 5x2 miles. The valley is about 6 miles long and the canyon north of it is another 6 miles long. The treaty contemplated a reservation of the "whole of Hoopa valley." When, therefore, the public notice in 1865 described a reservation whose north-south dimension was the river from the beginning of the valley on the south to the junction with the Trinity on the north, the reservation was being doubled in size, in that dimension alone. And, significantly, the added area in the north--the canyon of the Trinity near the junction with the Klamath—was native territory of the Yuroks.

The Trinity River in the Hoopa Valley, described by Wiley in the foregoing notice as bisecting the reservation he located, flows north through the valley to the junction of the Trinity and the Klamath. The valley of the reservation was for a time thought of as 16 miles long, but was finally regarded as 12 miles in extent. Since the reservation was described as extending 6 miles on each side of the river, to the junction of the two rivers, the reservation formed a 12-mile square bisected by the last 12 miles of the Trinity River, and was to be called the "Square" or the "12-mile Square."

The Square was centered on the trunk of the Y formed by the two rivers (finding 2, *supra*). Compared to the Square, the Klamath River Reservation was in terms of the Y a thickening of the upper half of the Y's left arm (finding 2, *supra*). Actually, the boundaries of the Klamath River Reservation zigzagged, following the river's turnings. Between the two reservations was non-reservation land and a stretch of the Klamath River about 25 miles long.

1864–1875—The Peoples of the Hoopa Valley Reservation

22. As of February 18, 1865, when Superintendent Wiley defined the boundaries of the Hoopa Valley Reservation (foregoing finding), there have been identified, among the "various tribes" resident there (finding 20, *supra*), a substantial number of the Hoopa tribe living in several villages in the Hoopa Valley proper, a smaller group of Lower Klamath or Yurok Indians living in a few villages in the northern and northwestern part of the tract and a number of Indians of the Redwood or Chilula tribe. (See findings 5, 20, *supra.*)

23. The native villages of the Hoopas were along the Trinity River in the Hoopa Valley, within the Square, and continuing upstream (south) to, at least, the Trinity's south fork, beyond and south of the Square.

24. The native villages of the Redwoods or Chilulas were elsewhere than on the Klamath or Trinity Rivers.

25. In 1865, Charles Maltby, the Superintendent of Indian Affairs, California, reported that it was expected that some 1,800 Klamath River Indians would move to the Hoopa Valley Reservation. The move did not take place.

26. Superintendent Maltby's report for 1865 states that the Hoopa Valley Reservation could support only the Indians living there at that time and "those that will probably come in from the vicinity."

27. A report of B. C. Whiting, Superintendent of Indian Affairs, California, to the Commissioner in 1868 stated that he was preparing a large number of Indian houses at Hoopa Valley for the Smith River Indians and such others as he could collect together.

28. (a) In 1869 more than 300 Indians were moved by the Superintendent to Hoopa Valley in the Hoopa Valley Reservation from the Smith River Reservation, terminated by statute. These Indians were of the Saiaz or Nongatl, the Wiyot, Wylackie and Sinkyone tribes. The native villages of these tribes were elsewhere than on the Klamath or Trinity Rivers.

(b) The report for 1872 by the Commissioner of Indian Affairs is revealing for its identification of the reservation with Indians generally in Northern California and its recognition of the varied tribes then on the reservation.

The report said:

> *Hoopa Valley agency.*—The Indians belonging to this agency are the Humboldts, Hoonsoltons, Miscolts, Siahs, and several other bands, numbering 725.
>
> A reservation was set apart per act of April 8, 1864, for these and such other Indians in the northern part of the State as might be induced to settle thereon. This reservation is situated in the northwestern part of the State, on both sides of the Trinity River, and contains 38,400 acres. * * *

Formal Location of the Reservation by Executive Order in 1876

29. Wiley's location of the reservation in 1865 was soon implemented by legislation for payment for the improvements made by settlers, but his action did not get Presidential confirmation for 11 years, until 1876.

By Executive Order of June 23, 1876, President Grant formally defined the boundaries of the Hoopa Valley Reservation as follows:

> It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed in 1875 by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked "H.V.R. No. 3"; thence south 17½° west, 905.15 chains, to southeast corner of the reservation; thence south 72½° west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the

> land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats. p. 39.)

The metes and bounds description of the reservation in this executive order encompassed substantially the same tract of land defined by Superintendent Wiley's more general description of February 18, 1865 (finding 21, *supra*), namely, an approximately 12-mile square tract bisected by a stretch of the Trinity River beginning at its junction with the Trinity River and continuing upstream for 12 miles for the extent of the Hoopa Valley.

Though the Commissioner in his letter of October 3, 1864 had cautioned Wiley to take special care in fixing the boundaries of the reservation "so that its proper limits may be of record in this office and the General Land Office, when approved by the President of the United States," the President's order is the first precise description of the reservation.

1876–1891—The Peoples of the Hoopa Valley Reservation

30. In 1875 and 1876, at about the time of the executive order formally defining the boundaries of the Hoopa Valley Reservation (preceding finding), there have been identified as living within the Hoopa Valley Reservation Indians the following tribes:

Tribe	1875	1876
Hoopas	571	511
Klamaths	43	44
Redwoods	46	12
Saias	56	13

31. From 1877 to 1891 there appeared in the annual reports of the Commissioner of Indian Affairs a schedule of all reservations listing, for each reservation among other things, "tribes occupying or belonging to the reservation." For the Hoopa Valley Reservation the tribes named were Hunsatang, Hoopa, Klamath River, Redwood, Saiaz, Sermalton, Miskut and Tishtanatan. The Hunsatang, Sermalton, Miskut and

Tishtanatan were regarded as "bands" of Hoopas, closely related to them.

32. In 1886 the Indians living on the Hoopa Valley Reservation included Hoopa, Yurok, Karok and Redwood Indians, according to the first census of the reservation, described below in finding 37.

The Enlargement of the Hoopa Valley Reservation by Executive Order in 1891

33. On October 16, 1891, by executive order, President Harrison extended the "Hoopa Valley Reservation" to include a tract "one mile in width on each side of the Klamath River" from the then northern boundary of the "Hoopa Valley reservation" to the Pacific Ocean:

> EXECUTIVE MANSION, *October 16, 1891.*
>
> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

34. President Harrison's order added to the Square the Klamath River Reservation, at the upper end of the Y's left arm (finding 22, *supra*), and the strip of land between the two reservations. The newly-added lands are herein called the "Addition."

The enlarged reservation consisted of the Addition, a tract 45 miles long x 2 miles wide, extending the length of the Y's entire left arm, joined to the 12-mile Square. The shape of the Addition and the Square combined was something like a square skillet with an extraordinarily long, thin handle.

In the enlarged reservation, the former Klamath River Reservation is herein called the "Lower Klamath Strip," and the intermediate strip of land is called the "Connecting Strip."

The entire reservation as enlarged contained 147,740 acres, 25,000 in the Lower Klamath Strip, 33,168 acres in the Connecting Strip, and 89,572 acres in the Square.

Access of Addition and Square Indians to the Enlarged Reservation

35. After 1891 Indians living on the Addition freely fished and hunted and gathered basket materials on the Square, and Indians of the Square freely fished and gathered basket materials on the Addition. There is no evidence that this was not the case prior to 1891.

36. After 1891, Indians of the Addition attended the boarding school maintained by the Government at the Indian Agency at Hoopa, on the Square, and came for medical treatment to the Government hospital there. There is no evidence that this was not the case before 1891, and there is some evidence that Indians from elsewhere than the reservation also came to the hospital for medical treatment.

Censuses on the Hoopa Valley Reservation

37. The first census roll listing the individual Indians of the original Hoopa Valley Reservation was compiled in 1886 under the supervision of Superintendent Dougherty. It was prompted by the Act of July 4, 1884, 23 Stat. 98, which instituted a practice of the annual taking of a census of Indians upon reservations.

This first census roll was entitled "Census of the Different Ranches of the Hoopa Valley Indians." It (and all censuses until 1930) did not show the tribe of the listed Indian. However, the Indians listed included, in fact, members of the Yurok, Karok and Redwood tribes, as well as Hoopas.

38. The 1887 census on the Hoopa Valley Reservation was designated the "Census of the Hoopa Valley Tribe of Indians." In 1888 and 1889, the census was headed "Census of the Indians of the Hoopa Tribe." In 1890 it was on some pages headed "Census of Hoopa Valley Reservation Indians" and on others "Census of the Hoopa Indians."

The Indians listed in these censuses included members of the Hoopa, Klamath River (Yurok and Karok) and Redwood tribes.

39. In 1892, the first year after the enlargement of the Hoopa Valley Reservation, and again in 1894, the reservation census was recorded in two parts. One part, variously called a census of the "Hoopa Indians of the Hoopa Valley Agency" and a census of the "Hoopa Valley Indians," listed the Indians on the Square, including the non-Hoopas resident there. The other part, called a census of the Klamath Indians of the Hoopa Valley Agency, listed the Indians on the Addition.

40. In 1893, and again in 1895, 1896, 1897, and 1899 (no census was taken in 1898; two were taken in 1899) only a census of the Indians on the Square was taken. In 1893 and 1899 it was called a census of the "Hoopa Indians," in the other years, a census of the "Hoopa Valley Indians." As before, it included the non-Hoopas on the Square.

41. The 1900 census of the Hoopa Valley Reservation intermingled in one list the Indians on the Square and on the Addition and was designated the "Census Roll of the Hoopa and Lower Klamath River Indians." These Indian names were as before not meant to be tribal but rather geographical; Karoks and Redwoods were included.

42. From 1901 through 1907, a census was taken only of the Indians on the Square. In these years the census was referred to as a "Census of the Hoopa Indians." As before, it listed Yuroks, Karoks and Redwoods in addition to Hoopas.

43. Beginning in 1910 and continuing each year through 1933, the census was recorded in three parts. One part was entitled "Census of the Hoopa Indians," another was the "Census of the Klamath River Indians of the Connecting Strip" and the third, "Census of the Lower Klamath River Indians." While most of those listed on the third part, "Census of the Lower Klamath River Indians," were of the Lower Klamath or Yurok tribe, the designation "Lower Klamath River Indians" did not refer to the Lower Klamath River or Yurok tribe as distinguished from the Upper Klamath River or Karok tribe, but rather meant the Indians on the Lower Klamath Strip. Most of those on the list entitled

"Census of the Klamath River Indians of the Connecting Strip" were Lower Klamath or Yurok Indians.

As before, the list entitled "Census of Hoopa Indians" listed the names of the Indians on the Square regardless of whether they were of the Hoopa, Yurok, Karok, Redwood or other blood.

44. Superintendent Keeley of the Hoopa Indian Agency wrote to the Commissioner on October 24, 1929 that it was meaningless to divide the Indians supervised by the Agency into Hoopas, Klamath River Indians, Lower Klamath Indians and the other tribes of whom census rolls were prepared annually:

> So far as these names are concerned and these divisions, they now mean nothing to us. At one time they possibly meant a division of the Indians so far as residence was concerned, but they have moved about so much and intermarried, and they have apparently been transferred at different times from one census to another until such division is absolutely worthless and confusing.
>
> They have lost tribal affiliation to such an extent that very few of them know what tribe they belong to, and if they name a tribe, it is, in fact not a tribe but a band of Indians named after some local name of a place where they once resided. This division has resulted in many duplications, we found when the enrollment of California Indians was made by Mr. John H. Anderson.
>
> I am now asking authority to revise this census and make up a new one, corrected in accordance with the affidavits furnished Mr. Anderson as to families, same to be a strictly alphabetical roll of the Indians under the jurisdiction of the Hoopa Valley Agency without the divisions noted above.

45. The census forms were revised for the year 1930 to include a space for designating the tribe of the individual to be listed, but the tripartite division was retained. The provision of a space for the tribe of the person listed did not appreciably improve the accuracy of the census as an indicator of tribal affiliation. Those listed on the part of the census entitled "Census of the Hoopa Indians" were nearly always designated as a member of the Hoopa tribe even though they were actually Lower Klamath (Yurok), Upper Klamath (Karok), Redwood Indians or of the blood of more

than one tribe. The individuals on the part entitled "Census of the Klamath River Indians" were designated as members of the Klamath River tribe and those on the census part entitled "Census of the Lower Klamath River Indians" were designated as members of the Lower Klamath tribe.

46. Some censuses listed off-reservation people, with off-reservation addresses. From about 1930, inclusion in the census was based not on residence but upon a concept of enrollment on the reservation equivalent to entitlement to be regarded as a reservation Indian (see findings 199, 207, 211, *infra*).

47. On January 12, 1933 Special Agent Roblin reported that the census rolls of Klamath River and Lower Klamath River Indians were inextricably mixed. Intermarriage and changes of residence had resulted in changes of names from one roll to another. Some of the confusion came, he said, from the use of the words Lower Klamath, the name of the strip constituting the former Klamath River Reservation; the Indians themselves referred to all Indians living below a village near the junction of the Klamath and Trinity as "lower Klamaths," which would leave all of the original Klamath River Reservation and the Connecting Strip in "Lower Klamath" country. The text of the relevant "Note" to his letter is set out in finding 94, *infra*, in another connection.

48. The tripartite division of the roll was ended in 1933. From that year until the last complete reservation roll was compiled in 1940, the Hoopa Valley Reservation roll was in a single part. The Indians designated as of the Hoopa tribe and as of the Klamath River tribe were intermingled, the designation Lower Klamath was dropped entirely. The roll continued to designate nearly every Indian residing on the Square as of the Hoopa tribe whether or not he actually was of Hoopa blood. In a few instances, mixed-blooded Indians were designated as Hoopa-Klamaths. On the 1940 roll, the designation Yurok was substituted for Klamath River. No roll was compiled in 1941. In the years 1934, 1935, 1938, 1939 and 1942 only supplementary rolls were compiled. No rolls were compiled thereafter.

Background of the 1891 Executive Order and the Act of June 17, 1892

49. (a) For about 20 years prior to the 1891 executive order there had been repeated recommendations by various officers that a reservation be established along the Klamath River for the Indians living there or that the Hoopa Valley Reservation be enlarged to encompass parts or all of the land bordering on the Klamath to the Ocean. Some of these recommendations are described in the following subparagraphs.

(b) A report of Special Commissioner John V. Farwell to the Commissioner in 1871 urged that the efforts of the Government to civilize the Indians would be facilitated by the extension of the Hoopa Valley Reservation to the mouth of the Klamath River so as to include the Klamath Indians.

(c) The report of Superintendent of Indian Affairs, California, B. C. Whiting, for 1871 states: "I would therefore respectfully recommend that the Hoopa Reservation be so extended as to take the [Klamath] river and the land for 3 miles back upon both sides to the Pacific Ocean, and thereby include the Klamaths, without requiring any to remove, other than those who may prefer to live at Hoopa."

(d) A report of September 1, 1871 from D. H. Lowry, Indian Agent, Hoopa Valley Reservation, states his belief that the some 2,500 Indians along the Klamath are well disposed towards the whites, deserving of assistance and come to the reservation for help in respect of crops, farming implements and otherwise, which he is unable to provide as he would like to, and which he recommends be provided. "I would also recommend that all the lands lying along the Klamath River, from a point 2 miles above the mouth of the Trinity River, extending back to the summits of the mountains on either side, be annexed to the Hoopa reservation, and be declared a part of the same."

(e) The report of the Commissioner of Indian Affairs to the Secretary for 1872 states the recommendation of the Superintendent of Indian Affairs, California, that the Hoopa Valley Reservation be extended to include the Klamath Indians who lived adjacent to the reservation along the banks of the Klamath and formerly belonged to the abandoned Klamath River Reservation.

(f) In 1885 Special Agent Paris H. Folsom conducted an investigation of apprehended troubles between whites and the approximately 200 Klamath Indians in 14 villages on the banks of the Klamath River between the Klamath River Reservation and the Hoopa Valley Reservation. He recommended that a 2-mile wide tract of land centering on the river between the two reservations be set aside for the sole use and possession of those Indians, and that the lands then be given in trust to the Indians. The Commissioner attached this report to his report to the Secretary for 1885, saying that he would make suitable recommendations for protection of the Indians in respect of their lands.

50. At the same time as these recommendations that a reservation be created along the Klamath, a movement was going on in Congress to open the lands of the Klamath River Reservation, as an abandoned reservation, to public entry and sale. The bills in Congress for this purpose, introduced from 1879 on, were steadily opposed by the Department of the Interior, which maintained that the Klamath River Reservation was not abandoned, was still in a state of reservation and that the homes of its Indians needed protection. The Department conditioned its willingness to agree to public sale on the bills being amended to protect the Indians by providing for the allotment of land to them in severalty, before public sale of the remaining lands.

51. The first bill for the public entry and sale of the Klamath River Reservation, in 1879, provided that the Klamath River Reservation "is hereby abolished" and directed the Secretary of the Interior to have the lands surveyed and opened to homestead, pre-emption entry and sale, "the same as other lands." S. Res. 34, 46th Cong., 1st Sess. (1879); 9 Cong. Rec. 1651 (1879).

52. No action having been taken on this bill, another, with the same provisions, was next introduced in 1880. 10 Cong. Rec. 286 (1880); H.R. 3454, 46th Cong., 2d Sess. (1880). The House committee report on this bill declared that the establishment of the reservation in 1855 had been a mistake and an injustice, because it blocked access of the adjoining lands to the river; that the reservation had been abandoned

after the flood of 1861, and that the Indians had been removed to Smith River and then to the Hoopa Valley Reservation "where they were permanently located." The report set out a letter from the Office of Indian Affairs in 1874, signed by Commissioner Shuter, stating that the flood in 1861 had rendered the reservation worthless and that the reservation "has not been used for any public purposes since the freshet referred to and the department has no claim upon it." H.R. Rep. No. 1354, *supra*, 2.

The report continued that white settlers had in reliance on this letter improved their homes and buildings but that nevertheless at the instance of the Department of the Interior in 1877 the War Department forced the settlers to leave the reservation; that the Indians now there did not belong there but belonged on the Hoopa Valley Reservation; that the area was extremely fertile and timbered and suitable for wine and fruit and timber-cutting, none of which could be developed because the reservation blocked access to the natural highway, the navigable Klamath River.

The report concluded (H.R. Rep. No. 1354, *supra*, 5):

> It is the opinion of the committee, after careful investigation, that the government can have no use for these lands as an Indian reservation. The Hoopah Reservation, to which the Indians were removed and settled upon after the freshet in 1862, is located but 15 miles from the abandoned Klamath Reservation, and is capable of sustaining many thousands more of Indians than are now located upon it. Why, then, should these lands in question be kept from settlement and improvement by white citizens who are eager to expend their labor and means in the development of their resources?
>
> If there be no use for this abandoned reserve for the purposes originally intended, the committee can see no valid reason why it should not be restored to the public domain, and again made free for the access of labor and capital of white settlers seeking homes and fields for their energy and enterprise. Entertaining this view, after an impartial and careful consideration of all the evidence submitted, they are constrained to report in favor of the measure, and they therefore return the bill to the House, with the recommendation that it pass.

The report did not mention (as appeared in a report in the next session) that the Indian Office opposed the bill. H.R. Rep. No. 1148, 47th Cong., 1st Sess. 1 (1882).

The bill as reported was recommitted and no further action was taken on it. 10 Cong. Rec. 3126 (1880).

53. An identical bill was introduced in the following Congress (H.R. 60, 47th Cong., 1st Sess. (1881)) and upon reference to the Office of Indian Affairs was there approved with an amendment providing for allotments to the Indians. 13 Cong. Rec. 90, 3414 (1882). Commissioner Hiram Price's letter of comment on the bill, dated March 24, 1882, stated (H.R. Rep. No. 1148, 47th Cong., 1st Sess. 2 (1882)):

> To return to the consideration of the bill: The lands embraced within the said reservation are not needed (as a reservation) for Indian purposes, but that the Indians residing thereon should be protected in the peaceful occupancy and enjoyment of their homes, to which they have become much attached, and where they have gained a livelihood unaided by the government for more than a quarter of a century, is certainly beyond dispute.
>
> In order to effect this, I have to recommend that a further provision be added to the bill, at the end thereof, in substance as follows:
>
> "That before any of the foregoing provisions except that authorizing and directing the Secretary of the Interior to have the lands embraced in said reservation surveyed, shall be held and deemed to be in effect, there shall be selected and allotted to each Indian belonging to and residing upon said reservation, lands within the limits of said reservation as follows:
>
> "To each head of family one quarter-section.
>
> "To each single person over eighteen years of age, one-eighth of a section.
>
> "To each person under eighteen years of age, one-sixteenth of a section."
>
> * * * * *
>
> With the amendment above proposed, I see no objection to the passage of the bill. * * *

The committee report also contained a letter dated September 26, 1881 from Lt. Gordon Winslow of the Army, the Acting Indian Agent. Lt. Winslow stated that a census of the Indians just taken under military auspices reflected the presence of 213 Indians on the Klamath River Reservation. The census, he said, was "as nearly accurate as it can well be"; his earlier report, in the same year, of 115 Indians was, he said, based on information from civilians "who are, I believe, somewhat inclined to lessen the number, thinking doubtlessly that the smaller the number the greater the likelihood of its being thrown open to settlers."

The committee approved the bill with the amendment suggested by the Commissioner. No action, however, was taken by the House.

54. The next three bills, in 1883 and 1884, in the 48th Congress, acceded to the desires of the Interior Department. The bills assumed that the Klamath River Reservation was in existence and provided that allotments to the Indians should be made before the land was to be opened to white settlement as public land. H.R. 112, 48th Cong., 1st Sess (1883); H.R. 7505, 48th Cong., 1st Sess. (1884), reported by the Committee on Indian Affairs as a substitute for H.R. 112; S. 813, 48th Cong., 1st Sess. (1883). These bills "abolished" the Klamath River Reservation and directed that the lands embraced therein be surveyed and "made subject to homestead and pre-emption entry and sale the same as other public lands," with, however, a proviso that before this was done there should be allotted land in stated amounts to the Indians belonging to and residing within the reservation.

55. Perhaps encouraged by the prospects of these bills, the Indian Bureau in 1883 began the work of allotment of Klamath River Reservation land, and selections were made by the Indians under the supervision of the Agent at Hoopa Valley. (The allotments fell through, however, when the surveys were found to be erroneous and fraudulent.)

56. None of the three mentioned bills (finding 54, *supra*) was enacted. The report of the Comissioner of Indian Affairs for 1885 says that it is "presumed that they were not reached in the regular course of business before adjournment." The Commissioner added that:

> It is my intention to ask at an early day for legislation suitable to the wants of these Indians. They do not need all the lands at present reserved for their use, but they should be permanently settled, either individually or in small communities, and their lands secured to them by patent before any portion of their reservation is restored to the public domain.

57. On December 21, 1885 identical bills were introduced in the House, repeating the provisions of the three bills intro-

duced in 1883 and 1884 (finding 54, *supra*). H. R. 158 and 165, 49th Cong., 1st Sess. (1885); 17 Cong. Rec. 370 (1885). No action was taken.

58. The years 1886 through 1889 saw no further bills for the sale of the Klamath River Reservation. Other significant developments, however, occurred. Congress in 1887 passed an act providing generally for allotments of reservation land to Indians in severalty and the federal courts in 1888 ruled that the Klamath River Reservation did not have the legal status of an Indian reservation. Both developments are discussed in the immediately following findings.

59. The General Allotment Act of February 8, 1887 (24 Stat. 388) authorized the President to survey the lands of any Indian reservation created by treaty, statute or executive order and "to allot the lands in said reservation in severalty to any Indian located thereon." As soon amended by the Act of February 23, 1891 (26 Stat. 794) each Indian was to receive ⅛ of a section (or 80 acres), the acreage to be doubled in size where the land was valuable only for grazing.

60. A case now arose of a commercial fisherman named Hume who employed Indians to fish in the Klamath River within the boundaries of the Klamath River Reservation, and paid them with goods. The Department of Interior, desirous of protecting the reservation from such intrusions, caused the prosecution of a libel against his goods, for unlicensed trading in an "Indian reservation" or in "Indian country" in violation of R.S. § 2133, as amended July 31, 1882 (22 Stat. 179).

61. The Government's position was set out in detail in a letter of April 4, 1888 from Commissioner J. D. C. Atkins, which the United States Attorney presented to the district court on the hearing of the case. On a review of the history of the reservation, the Commissioner concluded that the Klamath River Reservation was regarded by the Department "as in a state of Indian reservation," under the supervision of the Hoopa Valley Indian Agency.

Commissioner Atkins quoted from a letter from Superintendent Wiley of January 19, 1865, in connection with the location of the reservation at Hoopa Valley, that it was his "present purpose" to locate the Indians then at Smith River "upon the land formerly occupied as an Indian reservation upon the Klamath River, and which was abandoned in 1861, but is still reserved by the Government. The Hoopa Reservation will either be extended so as to cover this point, or it will be kept up as a station attached to that reservation and under the control of the same agent." Commissioner Atkins said that this letter showed that the plan of the Superintendent was to "annex the Old Klamath River Reservation (with which we are now especially concerned), to the new Hoopa Valley Reservation." "I find," he concluded, "that this office warmly commended and approved the superintendent's course."

The Commissioner also quoted from letters from former Commissioners to the Secretary of August 14, 1877 and March 8, 1878, stating that when the Agency at the Klamath River Reservation moved to the Smith River Indian Reserve and the Indians (with the exception of one band) refused to leave (finding 8, *supra*), "it was not deemed advisable to recommend its [the reservation's] restoration to the public domain," and that "In view of these facts the reservation should, in my opinion, be preserved intact until some measures are devised for the permanent settlement of these Indians."

62. The district court on June 7, 1888, nevertheless dismissed the libel, with an opinion holding that the Klamath River Reservation did not have the legal status of an Indian reservation, although, the court also held, the reservation was not open to public entry as public lands. The act of 1864 (finding 10, *supra*), the court held, had authorized the creation of four reservations; lands of old reservations not set apart within the four new reservations were under section 3 of the act not subject to the operation of the general land laws but reverted to the control of the Secretary of the Interior, for survey and sale at auction. The President, the court continued, had in various orders and modifications of orders exhausted his authority under the act by the creation of four reservations—the Tule River Reservation, the Hoopa Valley Reservation (as to which, the court said, a suggestion that it include the Klamath River Reservation was not adopted), the Round Valley Reservation and Reserves for Mission Indians—and the Klamath River Reservation not having been included in any of the four reservations, the lands of that reservation were under section 3 of the act

relinquished "for the purposes of Indian reservations," and came into the possession of the United States for the survey and sale provided for by that section. *United States* v. *Forty-Eight Pounds of Rising Star Tea etc.*, 35 Fed. 403 (D.C.N.D. Calif. 1888).

63. The Secretary of the Interior requested that the Attorney General appeal the foregoing decision of the district court. In the Secretary's annual report for 1888 he said that in order to protect the Indians, authority ought at once be given, during the pendency of the appeal "to set apart these lands as a reservation and thus remove all doubt."

64. On January 14, 1889, while the Hume case was pending on appeal, another bill was introduced in the House to open the Klamath River Reservation to public sale. H.R. 12104, 50th Cong., 2d Sess. (1889); 20 Cong. Rec. 756 (1889). Perhaps in response to the district court's ruling that the reservation had lost its status as an Indian reservation but had not become public land, rather having come into the possession of the United States, under the act of 1864, for the purposes of survey and sale, the bill provided that the reservation should be regarded for the purposes of the act as in a state of reservation within the meaning of the General Allotment Act of 1887 (finding 59, *supra*), and lands should be allotted to the Indians pursuant to that act, before public sale took place. Further, that surplus lands after allotment, despite the contrary provisions of the General Allotment Act, would be deemed to be and held as public lands subject to the laws for the disposition of public lands.

No action was taken on the bill.

65. (a) Shortly thereafter, and while the Hume case was still pending on appeal, the Senate by resolution of February 13, 1889 (20 Cong. Rec. 1818 (1889)) directed that the Secretary of the Interior inform it as to what proceedings had been taken for the survey and sale of the Klamath Indian Reservation, presumably the survey and sale which the district court had held was now the province of the Secretary. The Secretary's response, in the form of letters from the Commissioners of Indian Affairs and the Land Office, was that no such proceedings had been taken, because the lands had been in a state of reservation continuously since 1864.

(b) The letter from Commissioner of Indian Affairs John H. Oberly, dated February 18, 1889, stated:

> In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid: on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this.

(c) The letter from the Commissioner of the Land Office, dated February 28, 1889, advised that surveys of the Klamath River Reservation were made in 1882; that in a letter of April 4, 1883 to the Secretary, the Commissioner of Indian Affairs "recommended that allotments be made to the Klamath River Indians based upon the public surveys herein stated, and that the rest of the reservation be restored to the public domain"; that attempts were made in 1884 by the Indian Office to make allotments using the surveys made but that on examination the surveys were found to be irregular and fraudulent and the allotments made were recommended for cancellation by the Indian Commissioner; and, finally, that resurveys had been made and were still under examination.

66. On April 1, 1889, the circuit court affirmed the decision of the district court in the Hume case, under the same title, in 38 Fed. 400 (C.C.N.D. Calif. 1889). The opinion of the circuit court was essentially the same as that of the district court (38 Fed. 400–1):

> The president did thereafter [after the act of 1864] act from time to time, and he did set off four tracts in different parts of the state for the purposes provided for, and he did not include in any one of them the "Klamath Indian Reservation," theretofore set apart. In setting apart these four reservations without including the

> Klamath reservation, he necessarily exercised his discretion, and, by implication at least, excluded them. As they were not retained by the future and further action of the president "for the purposes of Indian reservations," "under the provisions of the preceding sections of this act," the reservation, by the terms of the act itself, abolished or abrogated the prior reservation. This necessarily follows from the provision requiring these lands not embraced in the reservations made by the action of the president under that act to be cut up into lots of suitable size and sold, as provided in the act.

67. In December 1889 and January 1890 identical bills introduced in the House and Senate provided, simply and without mention of allotments, that "all of the lands in what was the Klamath River Reservation" are "declared to be subject to settlement, entry, and purchase" under the land laws. H.R. 113, 51st Cong., 1st Sess. (1889); 21 Cong. Rec. 229 (1889); S. 2297, 51st Cong., 1st Sess. (1890); 21 Cong. Rec. 855 (1890).

The bills were opposed in a report by the Indian Office dated October 15, 1890 (described some months later in a letter of January 7, 1891 from Commissioner Morgan to the Secretary), recommending that the bill be amended to provide for allotments to the Indians under the General Allotment Act, the surplus unallotted lands to be restored to the public domain and the funds from the disposal of the lands to be put to the credit of the Klamath River Indians. With such a provision for allotments, the Indian Office said, it would not object to the sale of the surplus lands. Without it, the Office would "strenuously oppose" sale of the land:

> In no event should the bill under consideration, or any other like measure be adopted unless provision is made for the allotment of lands in severalty to the Indians and some means provided to enable them to get a start in agricultural pursuits, and for the education of their children. With such protection and assistance secured to them, this office would interpose no objection to the disposal of the surplus unallotted lands as provided in the bill under consideration. But it would feel bound to strenuously oppose any measure looking to the opening of the lands of said reservation to settlement or sale that did not secure to the Indians permanent title to their homes, which can best be done by allotting lands in severalty to them as hereinbefore recommended.

68. Amendment of the bill as urged by the Indian Office was emphatically rejected by the House Committee on Indian Affairs. On April 1, 1890 the Committee reported H.R. 113, still providing for public sale, but with an amendment affirmatively rejecting any allotments on the Klamath River Reservation. The amendment provided that the Indians on the Klamath River Reservation be removed to the Hoopa Valley Reservation and there allotted, and that the proceeds from the sale of the lands be a fund to be used by the Secretary of the Interior for the "*removal*, maintenance, and education" of the Indians residing on the lands and their children. (Emphasis added; H.R. Rep. No. 1176, 51st Cong., 1st Sess. 2 (1890).) In this form the bill passed in the House, in September, 1890 (21 Cong. Rec. 10702 (1890)) and in the Senate was referred to committee (21 Cong. Rec. 10740 (1890)). The Senate took no action, either on the bill as first introduced or as it passed in the House.

69. The passage of a bill so flatly rejecting allotment and providing for public sale spurred the Department of the Interior to action. On December 23, 1890 the Secretary suggested to the Commissioner of Indian Affairs that he "consider the question whether a reservation should not be made for the Klamath River Indians, * * * and if so, you will please prepare the proper description and orders for the purpose."

70. Commissioner Morgan responded promptly, on January 7, 1891, and at length. Reviewing the establishment of reservations in California under the act of 1864 (finding 10, *supra*), he raised a question as to whether four reservations were in fact established under that act. The Smith River Reservation, he said, was intended to be only temporary and the Tule River Reservation was simply leased and not set apart under the act. His implication was that, contrary to the premise of the decision in the Hume case (findings 62, 66, *supra*), the President had not exhausted his authority under the act of 1864 to create four reservations in California.

He also discussed the proposed legislation to sell publicly the lands of the Klamath River Reservation, and the opposition of the Department of the Interior unless the bill were amended to provide first for allotments of land thereon to the Indians in severalty, and urged further efforts to cause the enactment of the legislation favored by the Department, i.e., for allotment of lands to the Indians resident there and sale of the surplus lands, with the proceeds to be used for the benefit of the Indians. As to non-reservation Klamath Indians, resident between the Hoopa Valley Reservation and the Klamath River Reservation, he noted and restated Agent Folsom's recommendation (finding 49(f), *supra*) that the connecting strip of land between the two reservations be set aside for Indian use.

He concluded by saying that he would prepare whatever papers were requested, but that he was not prepared to recommend the establishment of a new reservation unless the Klamath's reservation was endangered, in which case the Hoopa Valley Reservation should be extended along the Klamath to the ocean:

> * * * If it shall be found that by the decisions of the courts or through the failure of Congress to act, the Klamaths are likely to loose [sic] the reservation established in 1855, it may become expedient to extend the Hoopa Valley reservation so as to include lands on both sides of the Klamath River, two miles in width on each side, from that reservation to the mouth of the river.

71. The Secretary thereupon sought the opinion of Assistant Attorney General George H. Shields, assigned to the Department of the Interior. Mr. Shields' opinion, dated January 20, 1891, responded as well to inquiries put to him earlier. He considered three questions: (1) "whether the Department is authorized to cause the removal of intruders from said [Klamath River] reservation"; (2) "whether the lands within the limits of said reservation can be allotted to the Indians living upon them, as reservation Indians, or under the legislation providing for allotments to non-reservation Indians"; and (3) the Secretary's immediate question, "whether the Hoopa Valley Reservation may not 'be legally extended so as to cover the ground of the Klamath Reservation.' "

The opinion described the creation of the various reservations under the act of 1864, particularly pointing out that reservations had been created of noncontiguous parcels and by orders and successive orders revoking and amending earlier orders and setting aside substituted lands as reservations, and continued:

> Three conclusions inevitably flow * * *: 1, that no formal order of the President retaining an existing reservation was deemed necessary, but its [the Tule River Reservation] actual retention by the officers of the Indian Bureau was sufficient to constitute it one of the four authorized reservations; 2, that contiguity was not an essential, but a reservation might be composed of several noncontiguous parcels of land; and, 3, that the Executive authority, in that respect, was not exhausted when once exercised in the setting apart of "four tracts" or parcels of land, as reservations; but that discretion continued, and yet exists, to change, add to, diminish or abolish reservations and establish others, as may seem most promotive of the public interests.
>
> In relation to the Klamath River reservation, as in that of the Round Valley, no formal or written order appears to have been issued for its retention. In both of these instances the Indian office retained possession and control of the former reservations, making no change in their condition, status or management, further than that they passed under control of the one State Superintendent as required by the act of 1864. The Indians remained in the occupation of both of these reservations, and yet so occupy them alone, except so far as that occupation may have been intruded upon by individual white men, under color of claims. Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on Klamath, and for the all sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect.

Mr. Shields then turned to a detailed statement of the "special circumstances" showing, he believed, that the Department had retained the Klamath River Reservation under the act and that it was a part of the Hoopa Valley Reservation.

Among the circumstances he relied upon were the following:

(a) The letter of January 19, 1865 from Superintendent Wiley to the Commissioner, stating that it was his intention to extend the Hoopa Valley Reservation so as to include the Klamath River Reservation "or it will be kept up as a station attached to that reservation and under control of the same agent" (finding 61, *supra*). This disposition, Mr. Shields noted, was approved by the Commissioner in his annual report for 1865.

(b) The Commissioner's letters of August 14, 1877 and March 8, 1878 to the Secretary, already quoted in finding 61, *supra*.

(c) The statement by the Secretary in his anual report for 1888 (at p. 76) that:

> Indians have continued to reside on the Klamath River lands, and those lands have been and are treated as in a state of reservation for Indian purposes, the jurisdiction is under the U.S. Indian agent for the Hoopa Valley agency.

(d) The rejection by the Commissioner in 1883 of an offer to lease the salmon fisheries of the Klamath River and to cut timber on its lands, with a statement that "The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority."

(e) The circumstances of the approval by the Secretary, in 1883, of a recommendation that allotments be made to the Indians of the Klamath River Reservation (see findings 55, 65(c), *supra*) and the circumstance that in the same year the Secretary, in an appeal in a Land Office proceeding involving the lands of the Klamath River Reservation (2 L.D. 460) had held that the lands were since the act of 1864 regarded as in reservation, noting that allotments had been made and that when the selections were all made he would consider the question of restoring the remainder to the public domain. The allotments which had been made were abandoned when the underlying survey was found to be erroneous and fraudulent. Another survey was made in 1886 and meanwhile land officers were instructed to permit no entries or filings on Indian lands.

Mr. Shields stressed that the Mission Reservation, created under the same act as that under which the Hoopa Valley Reservation was created, was in accordance with orders of four Presidents composed of 19 different noncontiguous parcels.

On the basis of the foregoing data and considerations, Mr. Shields gave his opinion that the Klamath River Reservation was part of the Hoopa Valley Reservation, one of the four reservations authorized by the act of 1864, and that intruders could therefore be removed. It followed, he said, that the Indians thereof could be allotted under the General Allotment Act of February 8, 1887 (finding 59, *supra*).

Mr. Shields then turned to the district court opinion in the Hume case, which he recognized to be contrary to his opinion, and a remedy for the defect the court had found in the status of the Klamath River Reservation. The opinion itself was distinguished as dictum; the decision was said to be correct for the reason that the Klamath was a navigable stream from which fishermen could not be excluded.

The principal reason underlying the district court's opinion was, in the view of the Assistant Attorney General, the absence of an executive order setting aside the reservation as part of the Hoopa Valley Reservation, an omission which could easily be supplied by an order, which the Assistant Attorney General held would be lawful, extending the Hoopa Valley Reservation to cover the area of the Klamath River Reservation:

> Judge Hoffman concedes that the lands in question are yet in reservation, though not for Indian purposes; that they constitute a reservation in fact, but not in law; and the principal reason why the legality is questioned appears to be because there was no formal executive order setting apart or retaining it as part of the Hoopa Valley reservation. This difficulty may yet be removed by the President issuing a formal order, out of abundant caution, setting apart the Klamath river reservation, under the act of 1864, as part of the Hoopa Valley reservation, or extending the lines of the latter reservation so as to include, within its boundaries, the land covered by the former reservation, and the intermediate lands, if the title to the last be yet in the United States. Such an order would be in accordance with the precedents in relation to the Tule river, Round Valley, and Mission reservations, the legality of which, as herein shown, has been repeatedly recognized by the legislative and executive branches of the government. I am therefore of the opinion that the Hoopa Valley reservation "may be legally extended, so as to cover the ground of the Klamath reservation."

72. On January 21, 1891, the day following Assistant Attorney General Shields' opinion to the Secretary, the Secretary requested the Commissioner to prepare the necessary orders for extension of the Hoopa Valley Reservation.

73. The response was delayed until May 5, 1891; Acting Commissioner Belt explained that the reason for the delay was that "a bill for the disposition of the Klamath reservation was pending, which it was thought might become a law with amendments satisfactory to the Department." (This was presumably a reference to possible Senate action on the bill passed in the House in September 1890 in the 51st Congress (finding 68, *supra*).) The response transmitted to the Secretary a draft of an executive order which provided for extending the Hoopa Valley Reservation to include a tract of land 1 mile in width on each side of the Klamath River from the present limits of the reservation to the Pacific Ocean. Acting Commissioner Belt implied that he had adopted the suggestion of the Assistant Attorney General—that an extension include the land between the two reservations—because of Agent Folsom's report on the Indians of the intermediate strip (finding 49(f), *supra*).

74. On October 12, 1891, Secretary Noble transmitted to the President, requesting his signature, a draft of the executive order extending the Hoopa Valley Reservation. Among the enclosures was Assistant Attorney General Shields' opinion (finding 71, *supra*), which, the Secretary said, contained a history of the reservation and "the reason for the issuance of an order in the premises."

75. Four days later, on October 16, 1891, President Harrison signed the executive order; its terms, set out in finding 33, *supra*, extended the boundaries of the the Hoopa Valley Reservation to include the Klamath River Reservation and the Connecting Strip between the two reservations.

76. Congressional proponents of public sale of the Klamath River Reservation did not cease their efforts on the issuance of the executive order incorporating the Klamath River Reservation into the Hoopa Valley Reservation. Either unaware of or indifferent to the executive order, they continued to press for the public sale of the lands of the Klamath River Reservation and, in the House, even to forbid allotment to the Indians thereof.

77. On January 5, 1892, 3 months after the executive order was signed on October 16, 1891 (finding 75, *supra*), H.R. 38 was introduced in the House, declaring that all of the lands embraced in "what was the Klamath River Reservation" were to be subject to settlement, entry and purchase, with a proviso that the proceeds of sale should be a fund used by the Secretary for the "removal, maintenance and education" of the resident Indians. H. R. 38, 52d Cong., 1st Sess. (1892); 23 Cong. Rec. 125 (1892).

The House committee reported the bill with only an amendment changing the last-quoted phrase to read "removal, maintenance *or* education." The committee report took the strong position that the reservation had been abandoned, as had been held by the federal courts, and that it was useless to allot any of its lands to the resident Indians, estimated by the report to be from 50 to 100 in number, because the Indians were "semicivilized, disinclined to labor, and have no conception of land values or desire to cultivate the soil"; that even if it were wise to allot lands to such Indians, these lands were unsuitable, whereas the nearby Hoopa Valley Reservation was adapted for allotments; and finally that while the Indians had not been cared for by the Government since 1861–62, the Government might hereafter desire to do so, and for this purpose the proceeds of the sale of the lands should be a fund, for their removal, maintenance and education. H. R. Rep. No. 161, 52d Cong., 1st Sess. (1892). No mention was made, in the report or in the brief debate in the House (see 23 Cong. Rec. 1599 (1892)), of any extension of the boundaries of the Hoopa Valley Reservation to include the Klamath River Reservation, of the Executive Order of October 16, 1891 effecting that extension, or of any recent change in the status of the Klamath River Reservation.

The bill as reported passed the House (23 Cong. Rec. 1599 (1892)) but in the Senate was stricken and another version substituted so as to delete the reference to removal of the Indians and to provide that before public sale, the lands should be allotted under the General Allotment Act of 1887 as amended. In this, the Senate Committee "had the recommendation of the Interior Department to draw the bill as it is reported." 23 Cong. Rec. 3918 (1892). As so amended the bill passed both House and Senate and became the Act of

June 17, 1892, 27 Stat. 52. Neither the brief debate nor the two conference reports contain any mention of an extension of the boundaries of the Hoopa Valley Reservation, the 1891 executive order or of any recent change in the status of the Klamath River Reservation. 23 Cong. Rec. 4225, 7771 (1892); 23 Cong. Rec. 3918–19 (1892). There was a reference in the Senate debate to a nearby reservation, doubtless the Hoopa Valley Reservation, "where these Indians [of the Klamath River Reservation] can go if they want to." 23 Cong. Rec. 3918, *supra.*

The proviso for allotments reads as follows (27 Stat. 52):

> *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof:

With elimination of the word "removal," the last proviso, with respect to the proceeds of public sale, reads as follows 27 Stat. 53):

> *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Allotments on the Hoopa Valley Reservation

78. (a) At the time of the issuance of the Executive Order of October 16, 1891 extending the boundaries of the Hoopa Valley Reservation to include the Klamath River Reservation and the enactment of the Act of June 17, 1892 for allotment and public sale of the lands of the Klamath River Reservation, the situation as to allotments on the now three parts of the Hoopa Valley Reservation was as follows.

(b) On November 29, 1887, within the year of the enactment of the General Allotment Act of 1887 (finding 59, *supra*), executive authority had been given for surveys preliminary to allotments in the Hoopa Valley Reservation, then consisting of the Square only. The survey was under way in 1889 and allotments were made temporarily until the survey could be completed.

(c) Preliminary work for allotments on the Klamath River Reservation had been begun in 1883 and fallen through (findings 55, 65(c) and 71, *supra*). Presidential authorization would be unnecessary for such allotments, for the act of 1892 (preceding finding) had supplied the requisite authority by its direction that allotments on those lands take place in accordance with the General Allotment Act.

(d) Presidential authority would be necessary for allotments on the Connecting Strip, land which had never before had reservation status. Such authority was soon supplied, and work on allotments on all three parts of the enlarged reservation continued and undertaken; it was executive policy to make the allotments on the reservation permitted by law (and in the case of the tract constituting the former Klamath River Reservation it was also the Congressional mandate).

79. The instructions to the allotting agents in the field, the accompanying departmental and Presidential correspondence, and the allotments made are the subjects of the following findings.

80. Allotments on the former Klamath River Reservation and the Connecting Strip were first brought up, after the enactment of the Act of June 17, 1892, by instructions proposed to be sent to the allotment agent. Such instructions were submitted for approval by Acting Commissioner Belt to Secretary Noble on September 23, 1892. The instructions are quoted in the finding next following, at the point of time when they were approved and dispatched.

On September 29, 1892 the Secretary reported to the President and requested authority for allotments on the Connecting Strip, as follows:

> By Executive Order of October 16, 1891, the limits of the Hoopa Valley Indian Reservation, in California, were extended so as to include a tract of country one mile in width on each side of the Klamath River and extending from the present limits of the said reservation to the Pacific Ocean.

> By the Act of June 17, 1892 (Public No. 84), the lands in what was the Klamath River Reservation, in California, comprising a strip of country one mile in width on each side of the Klamath River commencing at the Pacific Ocean and extending up said river a distance of twenty miles, may be allotted and reserved as therein provided.
>
> It is reported by the Commissioner of Indian Affairs that not more than forty allotments will be claimed by Indians who are residents on the original Klamath River Reservation, but that four hundred and seventy-five Indians reside on the strip of country between the two original reservations and on this strip there are several so-called Indian villages.
>
> The Commissioner is of opinion that when the lands are allotted under the Act of June 17, 1892, allotments should also be made to the Indians on the strip.
>
> Concurring in the views of the Commissioner, I have the honor to recommend that authority be granted for allotments in severalty under the Act of February 8, 1887, as amended by the Act of February 28, 1891, to the Indians on the strip of country added to the Hoopa Valley Indian Reservation in California by Executive Order of October 16, 1891, except that portion embraced within the original Klamath Reservation, on which allotments are authorized by the act referred to, and for the necessary surveys, and that your authority be endorsed hereon.

President Harrison approved, on September 30, 1892, by signing a memorandum presented by the Secretary reading "Relative to allotments to Indians located on strip of country added to Hoopa Valley Reservation, California, and for necessary surveys of same."

On October 8, 1892 the Secretary transmitted to the Commissioner the President's authorization, appointed Ambrose H. Hill "to make these allotments and also the allotments on the original Klamath River Reservation" and approved the draft instructions submitted to him on September 23 (*supra*), upon which the Commissioner sent the instructions to Mr. Hill.

81. The letter of instructions to Special Agent Hill of September 23, 1892, first dealt with the allotment of the lands of what was the Klamath River Reservation. The 1892 act was described; the agent was to advise the Indians of their opportunity and have them sign an application. The letter recognized explicitly the applicability to allotments of

both the General Allotment Act and the act of 1892, both generally and in the following paragraph:

> The allotments are to be made under the Act of February 8, 1887, "or any act amendatory thereto." Said Act has been amended by the Act of February 28, 1891. Under the former act as amended by the latter, each and every Indian located on the reservation, (Original Klamath River) is entitled to 80 acres of agricultural land, or a double quantity of grazing land. No Indian is entitled to an allotment unless he was located on said reservation on the 17th of June, 1892.

The letter of instructions then gave a series of detailed procedural rules for the making of allotments, and went on to the subject of allotments on the Connecting Strip.

82. In opening the discussion of the Connecting Strip the instructions mentioned the extension of limits of the Hoopa Valley Reservation by executive order of the prior year to include not only the "original Klamath River Reservation" but also the "connecting strip" of 2 miles centered on the river. Allotments to Indians on the Connecting Strip were, it was noted, not authorized by the Act of June 17, 1892, but were to be made by authority of the President under the General Allotment Act, the Act of February 8, 1887, as amended February 28, 1891:

> By an Executive Order, dated October 16, 1891, the limits of the Hoopa Valley Reservation were extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the limits of the Hoopa Valley Reservation, as then existing, to the Pacific Ocean, "Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended"—This extension of the Hoopa Valley reservation included the original Klamath River reservation, the subject of the foregoing instructions and of the Act of June 17, 1892, and also a strip of country 1 mile in width on each side of the river, between the two reservations. This connecting strip is not included in the provisions of the Act, but the President has authorized allotments to be made to the Indians located thereon. As soon, therefore, as you complete the allotments on the original Klamath River Reservation you will proceed to make those on the connecting tract. Agent Beers reports that these Indians number some 475. Allot-

> ments should be made under the foregoing instructions except that as they are not required to apply for allotments, you need not have them sign an application. You will observe that tracts to which valid rights have attached are excepted from the reservation and are therefore not subject to allotment. I enclose for your information list of entries within the strip.

The "foregoing instructions," mentioned in the third-from-last quoted sentence, were a reference to the detailed procedural instructions earlier given for the making of allotments on the former Klamath River Reservation.

83. Hill proceeded to the reservation and on February 13, 1893 he submitted a schedule, approved on August 11, 1893, of 161 allotments of "lands allotted to Indians located on the Original Klamath River Reservation." The allotments varied widely in size, from 8 to 160 acres, averaging approximately 60 acres each, to a total of 9,762 acres. Of the 161 allottees, two are known to have been Indians of Hoopa blood who had resided on the lands of the original Klamath River Reservation for many years prior to receiving their allotments.

84. In February, 1894, Charles W. Turpin succeeded Hill and undertook the completion of allotments on the Connecting Strip.

The instructions to Turpin, from Acting Commissioner Frank C. Armstrong, dated February 21, 1894, in relevant part read as follows:

> Having been assigned to the duty of allotting lands to the Indians of the Hoopa Valley Reservation in California, the following instructions are given for your guidance.
>
> By an Executive Order, dated October 16, 1891, the limits of the Hoopa Valley Reservation were extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the limits of the Hoopa Valley Reservation, as then existing, to the Pacific Ocean, "Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended." This extension of the Hoopa Valley Reservation included the original Klamath River Reservation, (which extended up the Klamath River one

mile in width on each side for a distance of twenty miles) and also a strip of country one mile in width on each side of the river between the Klamath River and the Hoopa Valley Reservations.

The allotments on the Klamath River Reservation have all been made and approved.

On the connecting strip Special Agent Hill has made 246 allotments and submitted duplicate schedules thereof to this office.

* * * * *

Your first duty will be to complete the work of making allotments on this connecting strip, of which Special Agent Hill reports that some 12 miles, on which are located about 125 Indians, remains to be allotted.

Allotments on this strip were authorized by the President September 30, 1892. They are to be made under the Act of February 8, 1887, as amended by the act of February 28, 1891, by which every Indian located on the reservation is entitled to 80 acres of agricultural or a double quantity of grazing land. Special Agent Hill however found it impracticable in very many cases to give the Indians, or to induce them to take, anywhere near the quantity of land allowed by the act. You will endeavor to allot them the full quantity where practicable, and where not, give them as much as they desire within the limit—much of the land is understood to be of no value to them.

* * * * *

3. Selection for orphans will be made by yourself and the Agent in charge of the Hoopa Valley Agency.

* * * * *

5. The tracts given to each allottee should ordinarily be contiguous, but he may be allowed to select detached tracts if necessary, in order to give him a proper proportion of agricultural land, wood and water privileges. Forty acre tracts of agricultural land may be divided into fractional parts of 20, 10, 5, or 2½ acres if necessary to secure to each family a due proportion of agricultural land.

6. Each Indian should be allowed to select his land so as to retain any improvements made by him. . . .

7. A description of the tracts to which valid rights had attached at the date of the Executive Order of October 16, 1891, was forwarded to Special Agent Hill March 14, 1893.

* * * * *

> Further instructions will be given you in regard to the allotment on the original Hoopa Valley Reservation.
>
> * * * * *
>
> Upon receipt of these instructions you will proceed to the Hoopa Valley Agency and reservation for the purpose of making the allotments thereunder.
>
> * * * * *
>
> I enclose copy of the act of February 8, 1887, and also of act of February 28, 1891.

85. Hill completed the allotments on the Connecting Strip in the year of his appointment, 1894, with the submission of a schedule of 253 allotments.

The Hill schedule was approved on June 23, 1898, and the Turpin schedule (with two exceptions) on June 27, 1898. The total almost 500 allotments varied in size from 5 to 160 acres and averaged approximately 40 acres each.

Two of these allottees are known to have been of Hoopa blood. They had been residents of the Connecting Strip for some years.

86. Surveys for allotments on the Square, begun (finding 78(b), *supra*) when the reservation consisted only of the Square, were completed on February 21, 1894, and the Commissioner then recommended that the authority of the President, necessary under the General Allotment Act, be obtained for the making of allotments. Acting Secretary Hines on February 23, 1894, requested Presidential authorization "for the making of allotments on the Hoopa Valley Reservation" under the General Allotment Act, and the President having on March 9, 1894 signed an order reading "Relating to the allotment of lands on the Hoopa Valley Reservation, California," the authorization was on March 12, 1894 transmitted to the Commissioner, who transmitted instructions to Special Agent Turpin on December 18, 1894.

87. The instructions of December 18, 1894 to Special Agent Turpin, after reciting the President's authorization for allotment of lands, stated:

> This reservation was established by the executive orders of November 16, 1855 and June 23, 1876 and embraces some 89,572 acres, the number of Indians located thereon being estimated at 475. The greater portion of the land is not susceptible of cultivation. In fact it is

> doubtful if there is over 3500 acres of arable land in the reservation.

Reference was made to a body of arable land located remotely on the reservation, not yet surveyed; a road to this land was under construction. Turpin was to survey this land and to make allotment of the lands already surveyed.

The instructions recognized that lands in the valley proper would be insufficient for full-sized allotments to those who might be entitled, and it was suggested that 5 or 10 acres of the available valley land be alloted, each Indian being allowed to retain his improvements, and that the allotments be filled out with lands "in other parts of the reservation":

> With regard to the lands in the Hoopa Valley you will consult freely and fully with Capt. Dougherty, and endeavor to satisfactorily adjust the holdings of the Indians to the surveyed lines. The lands in this valley should be divided as equitably as possible among the Indians located thereon, each Indian being allowed to retain his improvements. It is not expected that these lands can be allotted in full quantity, but those in possession may be given 5 or 10 acres, and more in cases where they have improved the same if it can be done without injustice to others. Capt. Dougherty is thoroughly familiar with the situation and will doubtless cheerfully aid you in this work. As far as practicable the allottees should be allowed to fill out their allotments by taking the balance in other parts of the reservation.
>
> In other respects you will be governed by the instructions given you February 21, 1894, for your guidance in making allotments on the addition to the Hoopa Valley Reservation.

88. In 1896, Turpin proposed about 395 partial allotments on the Square of small tracts of about 5 acres of agricultural land, most of them in the valley proper. Grazing and timber lands were not allotted, and the Commissioner reported that further surveys would be necessary before the allotments could be completed.

Years passed, however, and the schedule of allotments was not approved because "many of the selections were described by metes and bounds and further surveys were necessary."

A new survey was made in 1915, and was approved in 1917.

89. On June 19, 1916, an ad hoc council of Indians, convened to pass on the applications of Indians from off the reservation for enrollment on the reservation with a view to obtaining allotments, petitioned the Commissioner, urging that outsiders, and particularly Klamaths, not be recognized as having any rights to the lands of the reservation (by which they meant the Square), which they wanted kept for members of the Hoopa Tribe alone.

The directions of the Indian Office to convene the council are the subject of finding 102, *infra*, and the council's place in the history of tribal organization is the subject of finding 110, *infra*. The letter is set out here, for its relevance to the subject of allotments:

> We, the members of the Hoopa Indian Council, representing the tribes of Klamath, Redwood, and the other tribes that come under the Hoopas, do hereby write a few lines in explanation of certain conditions existing on the Hoopa Reservation in regard to the allotments that are now pending. In the first place there are Indians living on the Reservation that we think have no tribal rights here, they having no Hoopa blood in their veins. And besides these there are a great many outside Indians that want to get land here. There are certain tribes that are regarded as having tribal rights on the Hoopa reservation. This we cannot understand. Take the Klamath for instance—they represent a different tribe, talk a different language, and have never associated with the Hoopas to amount to anything. As near as we can understand the Hoopa and Klamath River reservation were allotted twenty some odd years ago. The Klamath are to-day enjoying the rights of their allotments, own their land and homes. While the Hoopas have had their land resurveyed and now are waiting to receive their allotments and are still uncertain about our land, and still they say we are linked with the other tribes. Surely there must be a mistake somewhere. This we would like to have looked into and corrected. We as members of the Hoopa Indian Council, knowing the real conditions that exist on the Hoopa Reservation, do hereby say that taking all things into consideration—the amount of land—the number of real Hoopa Indians, that members of the Hoopa tribe as an average are having a hard time to make a living on the land they are now working. And to crowd us still closer would be reducing some to poverty. This we do not wish to see, as we are looking forward to the future. To you therefore, the Commissioner of Indian affairs, we ask to do all in your power to have the Hoopa Reservation set aside for the members of the Hoopa tribe, that

they may get enough land to make a living on. All we ask is to be given an equal chance.

90. On July 17, 1918, pursuant to the new survey (finding 88, *supra*) Superintendent Mortsolf was instructed to make allotments in the Hoopa valley proper and in the grassland area of the Square known as Bald Hills. There were about 1600 acres of arable land in the valley and 2000 acres of grazing land in Bald Hills. (The rest was largely timberland, the source of the present controversy.)

On March 2, 1922, and July 25, 1923, there were approved 365 allotments in the valley and at Bald Hills, listed on an original and three supplementary schedules, designated A, B and C, submitted by Superintendent Mortsolf. The allotments were small, averaging 8 acres.

A Mortsolf Schedule D of 38 allotments, submitted on December 10, 1921, and a Schedule E of three additional allotments, submitted on February 12, 1924, were not approved because they had not been surveyed.

There the matter rested for almost 10 years, until 1932.

91. On November 2, 1932, Commissioner Rhoads directed Special Allotting Agent Charles E. Roblin to proceed to the Hoopa Valley Agency to confer with Superintendent Boggess concerning the making of further allotments on the Square and a general study of the allotment situation there.

Agent Roblin made a first report by letter of November 19, 1932 in which he concurred in a recommendation of the Forest Service that land covered by forest or heavy brush or otherwise rendered unusable for agricultural or grazing purposes should be retained as tribal land. Such lands, he wrote, constituted a "very large percentage" of the reservation lands; there remained for allotment only a "very limited area" of agricultural land and other land which might profitably be used by individuals, the majority of the suitable lands having been disposed of by the 365 allotments made in 1922 and 1923. These former allotments he described as "apparently provided for the Indians of the Hoopa Valley Reservation, California, who were then entitled to lands in allotment by reason of use and occupancy, under instructions theretofore issued."

92. Roblin dwelt in detail on the large number of possible

claimants, estimating that 600 Indians of those on the Connecting Strip and the Square would probably seek allotments:

> The Hoopa Agency census rolls for 1932 show the following numbers of persons:
>
> | | |
> |---|---|
> | Hoopa Valley (original Hoopa Valley Reservation) | 561 |
> | Klamath River (original twenty mile strip from Pacific Ocean, along Klamath River) | 608 |
> | Lower Klamath (Connecting strip along Klamath River, between original Klamath River Reservation and original Hoopa Valley Reservation) | 373 |
> | Total | 1, 542 |
>
> Of these persons it is probable that only those of the the original Hoopa Valley Reservation and of the connecting strip will desire allotments on the Hoopa Valley Reservation. These total 934. The available record does disclose how many of these are without allotments; but, as the original allotment rolls covered only 365 allottees, and as a certain proportion of these are now deceased and so not now on the census rolls, a conservative estimate would indicate that at least 600 of those now on the rolls are unallotted.

93. Assistant Commissioner Scattergood acknowledged Roblin's report on December 13, 1932. Noting that on some reservations the Indians, rather than receiving allotments, had received assignments by which the occupant was permitted to live upon and improve a tract as if it were his own so long as he made beneficial use of the land, Scattergood requested Roblin's views on the advisability of making assignments rather than allotments on the Square.

Roblin responded by letter of January 12, 1933, in which he recommended that the persons named on Mortsolf's Schedules D and E (finding 90, *supra*) should have those tracts allotted to them, and that claimants whose selections covered land which would not require supplemental surveys should have that land allotted to them, provided their "enrollment on the Hoopa Valley Agency rolls has been regular and they are entitled to allotment," but that the lands which would require supplemental surveys if allotted and certain other lands surveyed but selected by children born subsequent to a certain date should be as assigned rather than allotted. This letter was "read and approved" by Superintendent O. M. Boggess.

94. In his letter of December 13, 1932 Scattergood had also asked Roblin for details of the cases of 125 Indians whose claims to an allotment, Roblin had reported, were in doubt. Scattergood asked on what the claims were based and why their rights were considered doubtful.

Roblin replied, in his letter of January 12, 1933 (a letter which as noted was read and approved by Superintendent Boggess) as follows:

> In my report of November 19, 1932, (L–A, 50666–32), I reported that selections had been filed by or on behalf of 125 persons whose right to allotment "is in doubt"; and the Office requests information as to the basis of these claims and "why the right to allotment is considered as in doubt". A check of the annual census reports for 1932 shows that all these claimants are carried on the rolls at Hoopa Valley Agency, either as "Hoopa" Indians, "Klamath River" Indians, or as "Lower Klamath" Indians. The Lower Klamath Indians are those living on or belonging with those who were allotted on the "Klamath River" reservation created November 16, 1855, extending for a width of one mile on each side of the Klamath River for a distance of twenty miles up from the mouth of that river. The unallotted portion of that reservation was returned to the public domain under authority of the Act of Congress approved June 17, 1892. The Hoopa Indians are those living on or belonging with the Indians of the "Hoopa Valley" reservation created August 21, 1864 and confirmed by Executive Order of June 23, 1876 in compliance with the Act of Congress approved April 8, 1864. The Klamath River Indians are those living on or belonging with the Indians of the Addition to the Hoopa Valley Reservation created by Executive Order of October 16, 1891, which addition is a strip extending for a width of one mile on each side of the Klamath River for a distance of approximately twenty-seven miles down that river from the northern boundary of the original Hoopa Valley reservation to join the original Klamath River reservation. This is generally known as the "connecting strip". See note, page 6.
>
> Under date of July 8, 1930 (L–A, 32789–30), the Office advised the superintendent of the Hoopa Valley Agency that the Hoopa Valley Reservation "was created under the authority contained in the act of April 8, 1864 (13 Stats., 39–40), for the accommodation of the Indians of the State of California, and was intended to include both branches of the Klamath River tribe", and that the

so-called connecting strip "is considered merely to be an addition to the Hoopa Valley Reservation".

The doubt as to the allotment rights of the 125 claimants mentioned seems to be very indefinite, and based largely on a desire of the Hoopa Indians to exclude the Klamath River and Lower Klamath Indians from allotment on the original Hoopa Valley Reservation, and also on a desire of the Hoopa Valley Agency officials to limit as far as possible the number of additional allotments to be made. This list also includes most of those who have heretofore been allotted field or grazing allotments and are now asking for "house lots" or additional areas of one sort or another. Two of these have received patents in fee for their original allotments, have sold them, now find themselves without title to any land on the reservation in their own right, and are applying for house lots or other land for themselves. These should probably be denied.

The rights of some are questioned because they were not living on the reservation when allotments were made in 1917 and 1918, but have moved onto the reservation since to secure better school facilities or some other advantage.

However, all these applicants are on the Hoopa Valley Agency rolls and are carried on the annual census reports; and as the Hoopa Valley Reservation was created as one of several reservations to be set apart for the "Indians of California", it is my opinion that the objection to the rights of these claimants, *as a class*, should be disregarded. In some few cases the objections may be substantiated by an investigation which would result in striking the names from the official rolls; but these cases would be very few.

* * * * *

[p. 6] Note. Page 1. The statement made by me on page 1 of this letter as to the status of "Klamath River" and "Lower Klamath" Indians, is not in accord with the statement in the fourth paragraph of page 1 of my letter of November 19, 1932, (L-A, 50666-32). I am advised that these two census rolls are inextricably mixed; that some years ago it frequently happened that Indians were changed from one roll to another by reason of intermarriage between Indians of the different rolls, or by reason of change of residence from one part of the Klamath country to another part. Some of this confusion seems to arise because the Klamath Indians themselves have a custom of designating all Indians living below a certain point on the Klamath River as "lower Klamaths", and those living above that point as "upper Klamaths". This point seems to be above the village

> of Weitchepec; and this would leave all of the original Klamath River Reservation and all of the connecting strip or Hoopa Valley Addition in the "Lower Klamath" country. However that may be, the Indians of the "Klamath River" and "Lower Klamath" census rolls are equally entitled to rights on the Hoopa Valley Reservation and on the addition thereto.
>
> The officials of the Hoppa Valley Agency realize that these rolls are not accurate and that they cannot be accurately reconciled without a field census being taken. They desire that such a census be authorized.

95. Roblin's recommendations with respect to the D and E schedules and to assignment rather than allotment were approved by the Commissioner on February 20, 1933.

96. By letter of February 20, 1933, Commissioner Charles J. Rhoads advised Superintendent Boggess that approval of the Mortsolf D and E schedules would be given. No further allotments would, however, thereafter be made, he wrote, because Indians of the Connecting Strip and the Lower Klamath Strip (which he called the "former Klamath River Reservation") would all be equally entitled to allotment on the Square (which he termed the "original Hoopa Valley Reservation"), and the available agricultural and grassland would be sufficient for so small a number of those qualified as to work injustice. The land would rather be assigned to those who would engage in actual beneficial use.

The relevant portion of his letter reads as follows:

> We have come to the conclusion that allotment schedules "D" and "E", referred to by Mr. Roblin in his letter of January 12, 1933, which were submitted several years ago but which were not then approved because of the need for additional surveys, should now be brought up to date and submitted for further consideration. * * * We feel that these unallotted qualified Indians have the strongest claims to allotments of any of the Indians on the reservation.
>
> We do not believe that further allotments should be made after the schedules referred to have been approved. *Indians of the "Connecting Strip" and of the former Klamath River Reservation would be entitled to allotments equally with those living on the original Hoopa Valley Reservation*, and it clearly appears from the reports that there would only be sufficient agricultural and grazing land on the reservation to allot a very small proportion of these Indians. Hence, it would be prac-

> tically impossible to determine which Indians should be given and which denied allotments so as not to work an injustice upon certain individuals.
>
> *   *   *   *   *
>
> * * * We believe it would be better to leave the lands in their present status, and assign the remaining unallotted agricultural and grazing lands to individuals who actually wish to make beneficial use thereof.
>
> For the reasons given after the schedules refered to above are approved, no further allotments at Hoopa Valley will be made at this time. [Emphasis added.]

Assignments were thereafter made, pursuant to Commissioner Rhoads' foregoing decision.

97. Most of the allotments on Mortsolf's Schedules D and E were thereafter, in 1933, approved; a few were delayed, for reasons not material, until 1950.

98. The Indian Reorganization Act of June 18, 1934 (48 Stat. 984) provided, *inter alia*, if the Indians of a reservation so voted, for an end to any allotments of Indian land in severalty, for continuation of any restrictions on alienation on any Indian lands and for the restoration to tribal ownership of any remaining surplus lands of any Indian reservation.

Section 18 of the act provided in pertinent part as follows (48 Stat. 988):

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application * * *.

Two elections were held on the Hoopa Valley Reservation, one for the Klamaths and one for the Hoopas. In a letter of October 20, 1934 Commissioner Collier advised the District Coordinator for the Reorganization Act that Superintendent Boggess was authorized to hold separate elections for the Hoopas and for the Klamath Indians, as follows (65 Dec. Int. Dept. 59, 68)

> Superintendent Boggess is authorized to hold two separate elections on the Hoopa Valley Reservation, one of them on Hoopa Valley proper for the Hoopa, and another election on the territory occupied by the Klamath Indians, when the Secretary calls such election.

In both elections, held December 15, 1934, the vote was overwhelmingly against the applicability of the act.

99. All told, assignments of land on the Square were made to nineteen Indians, known to be non-Hoopas, of the Lower Klamath or Yurok tribe and of the Upper Klamath or Karok tribe.

100. (a) All told, 35 Indians known to be non-Hoopas, of the Lower Klamath or Yurok tribes, the Upper Klamath or Karok tribe and the Redwood tribe, received allotments on the Square. Most of the allottees on the Square were, of course, Hoopas.

(b) Four Indians known to be of Hoopa blood received allotments on the Addition. Most of the allotees on the Addition were, of course, Yuroks.

(c) The non-Hoopas allotted on the Square were connected with the Square by residence there or by parentage, their parents having resided on the Square.

(d) The Hoopas allotted on the Addition were connected with the Addition by residence there.

Administrative Rulings

101. In connection with the allotment program, officials of the Indian Office on a number of occasions ruled that Indians of the Addition and the Square—Klamaths and Hoopas and others—were equally entitled to rights in the entire reservation as enlarged and, specifically, in the Square. These rulings are detailed in the following findings.

102. In 1915, while surveys for the final allotments on the Square were under way, there were several cases of Indians from outside the reservation who unsuccessfully sought to be enrolled with the Indians of the reservation with a view to becoming eligible for an allotment. One such applicant, James McDonald, was a half-Yurok who had lived on the Addition for some years.

C. F. Hauke, the Chief Clerk of the Indian Office, directed that McDonald show by affidavit the dates of his residence on the reservation, how "tribal relationship has been maintained," and that the matter then be presented to a council of Indians of the Hoopa Valley Reservation for an expression of views as to whether he and his children were considered to be "recognized members of the tribe."

On November 8, 1915, Superintendent Mortsolf at Hoopa valley advised that as instructed he had convened a council of five Indians, who had rejected McDonald's application as well as those of three other Indians, for the same reasons, stated as to McDonald as follows:

> * * * James McDonald is not of Hoopa blood, and has no realtives [sic] either living or who have lived here; that he has never lived here, and that the quantity of land here is not any more than sufficient for the people who have always lived here.

On December 2, 1915, Hauke inquired of Mortsolf whether the council "represented all the tribes having rights on the Hoopa Valley Reservation, or only the Hoopa Tribe," and on the following January 15 Hauke requested that new applications be submitted, giving details of birth and Indian blood and stating whether the applicant's parents were "enrolled and recognized members of one of the tribes having rights on the Hoopa Valley Reservation and received benefits therewith." Such new applications, he said, should be submitted to a council "representative of the tribes having rights on the Hoopa Valley Reservation" for an expression of their views as to whether the applicant or his parents have "at any time been considered as recognized members of one of these tribes."

Mortsolf asked for guidance as to what tribes had rights on the reservation, as follows:

> I am not, nor never have been sure just what tribes have rights on the Hoopa Valley Reservation, never having seen a copy of the Act of Congress approved April 8, 1864 which is referred to in the Presidential proclamation determing [sic] the reservation.
>
> I will thank the Office to send me this information which now is necessary for me to have in order to determine whether any council would be representative of all tribes having rights here.

To this Hauke replied on February 19, 1916 that the tribes occupying and belonging to the Hoopa Valley Reservation were the "Hunsatung, Hupa, Klamath River, Miskut, Redwood, Saiaz, Sermalton, and Tishtanatan":

> The Act of Congress approved April 8, 1864 (13 Stat. L., 39), mentioned in Executive Orders of November 26, 1902 [an error], June 23, 1876 and October 16, 1891. makes no reference to the tribes having rights on the Hoopa Valley Reservation.

> The tribes living on the reservation that have participated in tribal benefits and been recognized as belonging on the said reservation may be considered for the purpose of passing on applications for enrollment as having rights therewith.
>
> From the annual report it will be noted that the following tribes are listed as occupying and belonging to the Hoopa Valley Reservation: Hunsatung, Hupa, Klamath River, Miskut, Redwood, Saiaz, Sermalton, and Tishtanatan.

(According to the Congressional Directory for 1916, Hauke was as Chief Clerk of the Indian Office the third ranking officer of the office. He followed in rank the Assistant Commissioner and preceded the chief inspector and the heads of the divisions.)

The defendant correctly characterizes Hauke's letter as evidence of Indian Office treatment of the Indians residing on the Square, the Connecting Strip and the Klamath River Reservation as having a common interest in those three tracts regardless of where they resided.

In pursuance of Hauke's instructions, Mortsolf added two members to the council, explaining to Washington that to the extent possible they represented the tribes listed by Hauke. He wrote that the Hunsatung, Saiaz and Tishtanatan were so scattered or intermarried with the Hoopa as to be extinct or unidentifiable, although councilman William Quimby was "a partial representative" of the Tishtanatan; that Hoopa "is the general name for practically all the minor tribes, which were represented at the time of the establishment of the reservation;" that the Redwood were once numerous but few were left, and that he had added William Stevens, "a full-blooded Redwood Indian," to the council to represent the Redwoods.

Of the Klamaths, Mortsolf said that they were "numerous;" that while "few of them live in Hoopa Valley proper, there are many of them adjacent, who are landless and who wish to acquire reservation rights. David Maston, has been added to the Council, to represent this tribe."

McDonald's new application was submitted to the council as reconstituted and was rejected because, the minutes recited, McDonald "does not belong to any of the tribes entitled to enrollment on the Hoopa Reservation."

Mortsolf then forwarded McDonald's application and the minutes of the meeting at which it was rejected, with a letter, dated June 19, 1916, urging that the council's action be approved. He said:

> The case of James McDonald is typical of practically all of the applications for enrollment from outside the reservation, and should the Office approve of the action and wishes of the Council and reject said application, there will be no need to take up the other cases mentioned in previous correspondence, unless any applications are found to differ in some of the essential points. It will be noted that the Hoopa Council unanimously voted recommending that the application of James McDonald be rejected. This council is composed of Indians living on the Hoopa Valley Reservation proper and represents all of the tribes not now extinct enumerated in the act of Congress and presidential proclamation setting aside this as an Indian Reservation.
>
> I hope that the Office may see fit to approve the recommendation and reject the application of James McDonald, insofar as his enrollment might entitle him to land within the Hoopa Valley Reservation. There are so many of these outside Indians who will apply for land and so little agricultural land available that it would defeat the purpose of allotment if the number of Indians were materially increased.

(Mortsolf is patently in error in referring, at the end of the first-quoted paragraph, to "all the tribes not now extinct enumerated in the act of Congress and presidential proclamation setting aside this as an Indian Reservation." There were no tribes enumerated in the act of 1864 (finding 10, *supra*) or in either of the two executive orders dealing with the Hoopa Valley Reservation (findings 29, 33, *supra*).)

On July 17, 1916, Hauke approved the rejection of McDonald's application, on the ground that McDonald was "never enrolled and recognized as a member of any of the tribes receiving benefits on the Hoopa Valley Reservation, nor did he ever maintain tribal relations therewith" and that the "representative tribal committee" had refused to adopt him.

Mortsolf had, with his letter of June 19, enclosed a letter from the council of the same date, on the general subject of the rights of Klamaths to allotments; the letter is set out in finding 89, *supra*. Hauke's letter of July 17 was addressed to Mortsolf and was a response to Mortsolf's letter of June 19 and not to the council's letter of the same date. Hauke does not mention the council's letter, and no response to the council's letter appears in the record.

103. The next ruling was made in connection with a protest of the allotments of Hoopa Valley land to a family named Horn, Karok or Upper Klamath Indians on the Turpin schedule, who were born on the Upper Klamath and came to Hoopa Valley in 1893. Superintendent Mortsolf reported as follows, on October 14, 1918:

> On the Klamath River there are two distinct languages spoken, namely, the Lower Klamath and the Upper Klamath. From the mouth up to and including Weitchpec, the Indians speak the Lower Klamath tongue and from above Weitchpec up as far a[sic] Happy Camp, the Upper Klamath River language is spoken. These languages are separate and distinct and I assume that there are two separate and distinct Indian tribes.
>
> At the time the selections were being made in that portion of the Reservation where the Horn allotments are located, a protest was made by James Jackson, Anderson Mesket and several others to the effect that the Horn family were not Indians who were entitled to lands in this Reservation.
>
> It is my understanding that the Hoopa Valley Reservation was established by an act of Congress, April 8, 1864 (13 Stat. 39) for the use and occupancy of several tribes of Indians among whom were mentioned the Klamath River tribes. It has never occurred to me that any distinction might be made between those Indians of Klamath River who live on the Upper and Lower part. I have, however, taken testimony of several witness [sic] publicly bearing upon these allotments and am submitting the same herewith. It is my opinion that there is no good reason why the Horn family should not be allotted at this time. Under date of July ly[sic], 1918, I was instructed by the Commission [sic] of Indian Affairs that those persons on the original allotment schedule should be given the privilege of making the first selections.

Chief Clerk Hauke, in a letter of April 22, 1919 (which both parties treat as the answering letter or an answer to a similar letter), agreed that the reservation was intended for the accommodation of the Indians of California, including both branches of the Klamath River tribe:

> Receipt is acknowledged of your letters of . . . March 8, 1919, with respect to the rights of certain Indians be-

> longing to the Upper Klamath Tribe or Band, to receive allotments with the Indians of the reservation under your charge.
>
> In answer, you are advised that the Office concurs in your view, that the Hoopa Valley Reservation which was established by the Act of April 8, 1864 (13 Stat. L., 39-40), for the accommodation of the Indians of the State of California, was intended to include both branches of the Klamath River Tribe. Further no restrictions whatever are made in the Executive Orders relating to the reservation, nor is it believed that the protests of the few Indians thereof to members of the Upper Klamath Band, should be allowed to interfere with these Indians, who, in the main were placed on the alllotment schedule made in 1895 by Special Allotting Agent Charles Turpin, as entitled to benefits of the Hoopa Valley Reserve.

Allotments of Square land to members of the Horn family were ultimately approved, and were among the allotments to non-Hoopas (finding 100, *supra*).

104. In 1927, again, Karoks, as Indians living in the immediate vicinity of the reservation, were held eligible to enrollment and to allotment, conditioned, however, upon their removal to the reservation, which was found not to have occurred in the case at hand. The Assistant Commissioner held that the reservation had been created in 1864 for all the Indians of California and that the extension of the reservation in 1891 to include the Lower Klamath Strip and the Connecting Strip was for the benefit of the Indians living along the Klamath.

The case was first presented on December 22, 1926, when Superintendent John D. Keeley wrote to the Commissioner concerning the applications of two Karok Indians, cousins, Rosa Sunderland and Linda Ince, for enrollment on the Hoopa Valley Reservation. Expressing some doubts as to whether the Karoks were a separate tribe or in reality the same as the "Klamath River Indians," he said that "[i]f these people have any right to enrollment it would be through the Klamath River Indians." He inquired "whether there is a distinction between the Klamath River Indians and the Hoopa Indians relative to tribal rights. Do the Klamath River Indians have any claim on the tribal lands of the twelve-mile square portion of the Hoopa Reservation?"

Mrs. Sunderland and Mrs. Ince had been born and raised at Happy Camp on the upper Klamath, above its junction with the Trinity, and thus off the reservation, and had apparently never lived on the reservation.

Assistant Commissioner E. M. Meritt responded on January 20, 1927, that the four reservations created under the 1864 act, of which the Hoopa Valley Reservation was one, were intended "to accommodate all the Indians of California" and that since the setting aside of the Hoopa Valley Reservation did not specify the tribes to occupy it and since the addition of the two Strips was for the benefit of the Indians along the Klamath, the Klamath Indians living in the immediate vicinity of the reservation had as much right as any other Indians, conditioned, however, upon their removal to the reservation:

> In your letter you ask to be advised as to whether or not the Klamath River Indians have any claim on the tribal lands of the twelve-mile square portion of the the Hoopa Indian Reservation. The twelve-mile square portion of this reservation was set aside by order of the Superintendent of Indian Affairs for California under authority of the Act of Congress of April 8, 1864 (13 Stat. L., 39), which authorized the setting aside of certain reservations for California Indians. These reservations were to be large enough to accommodate all the Indians of California. Neither the withdrawal nor the Act of Congress specified any particular Indians who were to occupy these reservations, and it is assumed that such Indians as are located in the immediate vicinity of the reservations are entitled to benefits thereon should they so desire. The one-mile strip on each side of the Klamath River was later added to the reservation for the benefit of the Indians living along the river. It is believed, therefore, that the Klamath River Indians have as much right on the reservation as any other Indians formerly residing in that part of the State of California, but it is believed that a removal to the reservation is necessary in order for them to obtain reservation land.

A second letter of May 11, 1927 from the Superintendent gave more information as to the distinction between Upper and Lower Klamaths—Karoks and Yuroks—and advised that the upriver Karoks had never moved to or become residents of the reservation, as distinguished from the Yuroks, or downriver Klamaths, who lived on the Addition, from Weitchpec, at the junction of the Trinity and the Klamath, to the ocean. Accordingly, he wrote, only the Klamath Indians who lived from Weitchpec to the mouth of the Klamath River—that is, on the Connecting Strip and the Lower Klamath Strip—were entitled to reservation rights and were entitled to enrollment.

> There being Indians from the mouth of the Klamath River practically to its head waters. Those from the mouth to Weitchpec are on our rolls, and are for the most part allotted; those from Weitchpec to Orleans, Happy Camp and up the river are not on the rolls of any agency so far as I know. * * *
>
> * * * * *
>
> It has been customary to assume or to say that all Indians of Del Norte and Humboldt Counties are under the jurisdiction of this Agency, however, the Indians from Weitchpec, up the river, are really public domain Indians and have never lived on any reservation. In view of the statement of your office in your letter of March 5, 1927, LA 586222 [not in present record] defining the Hoopa Valley jurisdiction, it would appear that the only Klamath Indians under this jurisdiction would be the lower Klamath Indians which I take to be those from Weitchpec to the mouth of the river.

Mrs. Sunderland and Mrs. Ince, as Upper Klamath Indians, were therefore, he continued, on the authority of the Commissioner's letter of January 20, 1927 (*supra*) not entitled to enrollment, because not resident upon the reservation, and could become so entitled only if they lived in the immediate vicinity of the reservation and moved to the reservation:

> * * * [Y]our office ruled that Dan Effman and family, formerly a Karok Indian of the Happy Camp band, was entitled to enrollment here, he having resided here on the Reservation for a number of years. In view of the statements in your letters above * * * referred to, it would appear that the upper Klamath River Indians, among which is the Karok band, are not within the jurisdiction of this Agency, and that the only way they could place themselves within the jurisdiction of this Agency would be to move to the Reservation and establish a residence thereon provided they were, prior to their removal to the Reservation, living

> in the immediate vicinity of this Reservation. It would appear from this that Mrs. Sunderland and Mrs. Ince would not be entitled to enroliment or allotment on this Reservation as they do not comply with any of the requirements cited above.

Accordingly, Mrs. Sunderland and Mrs. Ince were denied enrollment on the ground that neither they nor the tribe of which they were members, the Karoks, had moved to the reservation.

105. Lawrence McCarty, a Yurok born on the Square who lived there until he was 15, in 1920, and then worked off the reservation, living there part-time, applied for enrollment in 1931, with a view to selection of land on the Square which he hoped to have allotted to him.

Superintendent Boggess forwarded his application to Washington on February 12, 1931, saying:

> Mr. McCarty desires to select land within the twelve mile square of the Hoopa reservation and inasmuch as in a previous letter the Office informed me that Klamath Indians might select land therein there appears to be no objection to the arrangement.
>
> I, therefore, recommend approval of his request as submitted.

Commissioner Rhoads approved the application on March 9, 1931, as follows:

> As he was born on the reservation of Indian parents, at least, one of whom was allotted, he is entitled to enrollment under the Oakes case (172 Fed. Rep., 305), and you are authorized to enroll him under Section 324 of the Indian Office Regulations of 1904.

106. On July 8, 1930 Commissioner Rhoads in a letter to Superintendent Boggess advised that there being no restrictions in the executive order which in 1891 added areas to the reservation, an Indian of the Connecting Strip could exchange his allotment for one on the square. The opinion was expressed in broad terms, generally permitting exchange of an allotment for another on the original reservation or within the areas added:

> The receipt is acknowledged of your letter of June 14, 1930 regarding allotment rights on the Hoopa Valley Reservation and the additions thereto.
>
> The Hoopa Valley Reservation was created under authority contained in the Act of April 8, 1864 (13 Stat.

> 39-40), for the accommodation of the Indians of the State of California, and was intended to include both branches of the Klamath River Tribe. The so-called connecting strip which was added to the reservation by Executive Order of October 16, 1891 is considered merely to be an addition to the Original Hoopa Valley Reservation. No restrictions whatever are made in the Executive Order relating to the reservation and no reason is seen why any Indian who holds his allotment in trust should not be permitted to change his land for vacant lieu land on the original reservation or within the areas added thereto.

107. Special Allotting Agent Roblin expressed the opinion in his letter of January 12, 1933, that Indians of all the three parts of the reservation were equally entitled to lands on the Square (finding 94, *supra*). He said that the Indians of the "Klamath River" and "Lower Klamath" census rolls, by which he meant the Lower Klamath Strip and the Connecting Strip "are equally entitled to rights on the Hoopa Valley Reservation and on the addition thereto." He had tacitly assumed this, in his earlier report of November 19, 1932, that the Indians of the Lower Klamath Strip would probably not desire allotments from the lands remaining unallotted on the Square, and that 600 of the 934 Indians on the Connecting Strip and the Square would desire such allotments.

108. Commissioner Rhoads on February 20, 1933 halted allotments, and directed that the remaining land on the Square be assigned, on the ground that Indians of the Addition and of the Square were equally entitled to allotments, and that there was insufficient land for allotment to all who would be entitled. The central portion of his ruling, more fully quoted in finding 96, *supra*, reads as follows:

> Indians of the "Connecting Strip" and of the former Klamath River Reservation would be entitled to allotments equally with those living on the original Hoopa Valley Reservation, and it clearly appears from the reports that there would only be sufficient agricultural and grazing land on the reservation to allot a very small proportion of these Indians.

The Hoopa Business Council of 1933

109. Historically, the Indian tribes who occupied or settled upon the Hoopa Valley Reservation were not politically organized, had no tribal government, at least in peacetime, and after the Hoopa Valley Reservation was established did not participate in its administration. This state of affairs continued until 1915.

110. (a) In 1915–16, in connection with applications for enrollment with a view to allotment, Superintendent Mortsolf convened a council which the Indian Office directed be representative of all the tribes having rights on the reservation (finding 102, *supra*).

(b) All the members of the council, including the Yurok added to the council to represent that tribe, resided on the Square. A petition by the council to the Commissioner, set out in finding 89, *supra*, showed that despite the directions from the Indian Office the council in fact spoke on behalf of Hoopa or Square Indians and in opposition to Yurok or Addition Indians. See also finding 102, last paragraph, *supra*.

(c) There is no evidence of any activity of this council beyond this brief period.

111. On May 5, 1930, Superintendent John D. Keeley reported to the Commissioner of Indian Affairs that the Hoopa Valley Reservation did not have a tribal council. (The report was made in connection with an application for enrollment, which Keeley thought should be denied, since the man involved had lived off the reservation all his life and did not plan to make his home on the reservation.) Of a council Keeley said that there was none and he was glad of it:

> As to putting the case up to the tribal council, this reservation does not have one, for which I am thankful, as tribal councils are the biggest source of agitation of anything in the Indian service. They are usually made up of the hand-picked agitators, and for the most part, the ones who can not, or will not, work or do anything for themselves.

112. Almost at the same time as this letter by Superintendent Keeley was written, Washington was writing to him, suggesting that a pending problem (the refusal of an Indian to do certain irrigation work) be presented to the tribal council. This letter was answered by Keeley's successor, O. M. Boggess, on July 24, 1930. Boggess replied that the problem had meantime been solved and, further "we have no tribal council and I doubt the advisability of organizing one."

113. On January 10, 1933, Superintendent Boggess wrote to Commissioner Rhoads that since the time of the visit of a Senate investigating committee to the reservation, "our Indians at Hoopa" had become interested in organizing "a Business Committee or as they call it Tribal Council" which would have between 6 and 12 members "to represent the Hoopas in official matters." Boggess added he had no objection to this, because some of the "best Indians of the Valley" had been selected for the "Committee." He further explained that the Committee preferred to represent the Hoopas only, allowing the Klamaths down the river, "who but seldom come to Hoopa," to form their own council:

> Because of the fact that the Indians down the Klamath river but seldom come to Hoopa, and their interests in many cases are different it is understood that they prefer a legally organized body of the Hoopas only; permitting the Klamaths to form a similar organization for their people if they should care to do so.

114. By letter of February 3, 1933, Commissioner Rhoads replied that the Indian Office had no objection to the formation of such a tribal council as the Superintendent had proposed. He cautioned, however, that its activities would be advisory only and that in most cases final action would remain in the Department of the Interior. The letter authorized Boggess to call a council of Indians of his jurisdiction to adopt a constitution providing for election of the business committee.

115. In the meantime, on January 23, 1933, Boggess wrote again to the Commissioner advising that some of the Indians living along the Klamath River had also formed a business committee to represent the Indians residing along the river. Boggess recommended that since the terrain made it difficult for the Indians along the entire river to meet to elect representatives, this informally created committee should be recognized in "ordinary matters." He said:

> Owing to the exceedingly rough nature of this section and the lack of roads it would be exceedingly difficult to require the Indian people along the entire river to meet together for a regular election of councilmen, and as the number of matters requiring their attention is but

> limited I do not think that they would be justified in going to this expense.
>
> I suggest, therefore, that the Office write this body that it is possible that their organization has not been effected in exact accordance with its rules in regard to the election of a business committee but that it will be glad to recognize them in all ordinary matters which they wish to present in behalf of the Indians residing along the Klamath.

116. Commissioner Rhoads responded on April 20, 1933 that it had been understood that the council proposed in the Superintendent's first letter of January 10 (and already authorized (findings 113, 114, *supra*)) was intended to represent "the various tribes of Indians within the Hoopa Valley jurisdiction" so that it could handle matters affecting all of the "Hoopa Valley Indians." The Indians along the Klamath, the Commissioner continued, could have a separate committee for "local matters not involving the whole Hoopa Valley jurisdiction," but, he wrote, matters involving "the whole tribe" should be handled by "the tribal business committee for the whole tribe." He said:

> It was our understanding that the organization proposed in said letter of January 10 was intended to represent the various tribes of Indians within the Hoopa Valley jurisdiction. In this way the business matters affecting all of the Hoopa Valley Indians could, no doubt, be more economically and expeditiously handled.
>
> If the Indians residing along the Klamath River desire to have a separate business committee of their own for local matters not involving the whole Hoopa Valley jurisdiction, this Office has no objection. However, in matters involving the whole tribe, it is believed that they should act through their respresentatives on the tribal business committee for the whole tribe. We do not see the necessity, however, for selecting more than one representative from each of the eight districts for this organization.

117. When organized, the business committee of the Indians along the Klamath River was advised by Superintendent Boggess that the committee "would have to be through the Hoopa Council and it would only be a sub-council." The Klamaths were "disappointed that they couldn't have their own full council," and the council "died out." (The quotations are from testimony of witnesses who recalled that attendance continued for only about a year.)

118. Sometime between February and May, 1933, Superintendent Boggess posted a notice calling for an election of the authorized council, but the response, he felt, was small and not representative, and no election was held at the appointed time. Thereafter, another plan was devised under which one representative was elected from each of a number of districts within the Square.

119. On June 3, 1933, seven Indians who had been elected councilmen from districts all of which were in the Square (and who were all residents of the Square) signed a petition to the then newly-appointed Commissioner of Indian Affairs, John Collier, in which they described themselves as "Councilmen of the Hoopa Tribe" and asked approval and recognition of their body as the representative of the "Hoopa Indians" to consider problems "within our boundaries," the boundaries not being specified. The petition said:

> We the undersigned duly elected Councilmen of the Hoopa tribe from the Hoopa Indian Reservation do hereby sincerely petition the Department of the Interior and John Collier, Commissioner of Indian Affairs, to be recognized as the authorized representatives of the Hoopa Indians to transact their business, negotiations and recommendations, to be consulted about expendetures [sic] and disbursements pertaining to the welfare of our tribe and absolute control of our tribal funds or any disposition of said funds.
>
> We sincerely wish to submit for your approval the organization of this tribe into seven Districts. Each of which have [sic] selected and elected by a majority of votes one Councilman for each district to meet one day each month to consider any problems which may arise within our boundaries.

* * * * *

120. On receipt in Washington of the petition, it was passed to the new Commissioner by J. R. Venning of the "Miscellaneous Section" of the Indian Office with a memorandum dated June 14, 1933, which, referring to the Department's letters of February 3 and April 20 (findings 114, 116, *supra*), said that no official report of the organization authorized had been received and that it was "quite probable" that the petition referred to the organization which had been authorized,

and, further, that while it looked like a good plan it would be well to have the constitution and the official report of proceedings before giving recognition.

121. Commissioner Collier thereupon on the following day wrote to Gilbert R. Marshall, secretary-councilman of the council, acknowledging receipt of the petition and requesting that Marshall confer with Boggess and ask him to write to Collier "as to the status of any tribal organization which may now exist at Hoopa."

122. Boggess was just about then, on June 19, writing to the Commissioner. Referring to the Office's letter of February 3 "authorizing the Indians of this jurisdiction to organize a tribal business committee" (finding 114, *supra*), he asked for recognition of a tribal business committee which had been elected in "each district of the reservation." The names of the districts were given. To one closely familiar with the neighborhoods in the Square, the names of the districts, all place names in the Square, six of the seven being places in the valley itself, would have disclosed that the electorate of the council was limited to the Square. The letter did not otherwise indicate the scope of the area—Square or entire reservation—or of the Indians to be represented by the committee.

123. On July 10, 1933, Boggess sent the Commissioner a copy of the constitution of "our Business Committee," with his recommendation that it be approved.

Before the constitution was received, Assistant Commissioner William Zimmerman, Jr., on July 21, 1933, responded to Boggess' letter of June 19, sending him a copy of the council's petition of June 3 (finding 119, *supra*), stating that Boggess' letter of June 19 gave insufficient information and asking for a report as to the organization and the matters taken up. This letter does not indicate that the constitution, mailed by Boggess on July 10, had been received.

124. The "Constitution and By-Laws of the Hoopa Business Council," (a single document), was sent by Boggess to the Commissioner on July 10. It provided as follows:

> Article 1. This organization shall be known as the Hoopa Business Council.
>
> Article 2. The members of the Business Council shall be elected to act for the tribe * * *.

> The views of the tribe having been determined, the business council shall be cloaked with authority to act in any and all tribal matters, including tribal claims of every nature.
>
> * * * * *
>
> Article 3. The business council shall be composed of seven enrolled members of the Hoopa tribe; bona fied [sic] residents of Humboldt County, California, and twenty-one years of age or over.
>
> * * * * *
>
> Article 18. This constitution shall be in full force and effect to govern the Hoopa tribe and business council on and after the date it is approved by the Commissioner of Indian Affairs at Washington, D.C.

Aside from the quoted references to "the Hoopa tribe," the constitution did not indicate the geographical scope of the jurisdiction of the council—whether Square or entire reservation, the districts from which the councilmen would be elected, the eligible class of electors, or give any other data which would disclose whether the council was to be representative of or empowered to act concerning the Square alone or the entire reservation.

125. On November 20, 1933 Commissioner Collier approved the constitution, in a letter addressed to the secretary of the Hoopa Business Council. The full text of the letter read as follows:

> This will advise that careful consideration has been given to the constitution and by-laws of the Hoopa Business Council submitted some time ago by the superintendent of the Hoopa Valley Indian Agency, and they are hereby approved.
>
> This organization is recognized by this Service as being the official representative body of the Hoopa Valley tribe.

A note at the foot of the letter reads "Carbon to Hoopa Valley."

The Hoopa Business Council—Composition and Operations

126. In July 1934, Superintendent Boggess responded to an Indian Office circular questionnaire on tribal governments on reservations. In answer to the question "Does your council or committee or other organization represent the entire reservation or jurisdiction or are there separate organizations for each tribe" he said that the council represented the Square only:

> Represents only the 12 mile square Hoopa proper [sic]. Klamath River, Extension a mile on each side of river from Hoopa reservation to Ocean, not represented on this council.

He confirmed this answer in responding as follows to a question as to the weaknesses of the present tribal government:

> Inability to have proper representation from Klamath River portion. Difficulty of travel makes it impracticable for them to attend. Being a separate tribe they are not welcomed by Hoopas on strictly Hoopa matters.

127. The members of the Hoopa Business Council organized pursuant to the constitution and bylaws of 1933 were elected from six districts in the Hoopa Valley proper and one district on Bald Hills near the Valley, all in the Square, by the Indians residing in those districts.

128. Though the constitution of the Hoopa Business Council provided that council members be enrolled members of the Hoopa tribe (finding 124, *supra*) Indians of Yurok and Karok blood were members for periods of many years. They were David Risling and Jerry Horne, residents and allottees of land on the Square; George Nelson and David Masten (the latter is the same "David Maston" as had represented the Klamaths on the 1916 council (finding 102, *supra*)), both of whom held allotments on the Connecting Strip and were long-time residents on the Square; and Elizabeth Quimby, a long-time resident of the Square.

129. A number of Indians of mixed Yurok and Hoopa blood were members of the council. They were Edward Marshall, chairman in 1933–35; Gilbert Marshall, a member during ten years, 1933–35 and 1945–50, and chairman in 1935–37; Julius Marshall, a member for five years, 1935–39; Mahlon Marshall, chairman during five years, 1939–43; James Marshall, a member in 1943–45; Ernest Marshall, a member in 1948–50; Delmar Colegrove, a member in 1938–39; Gene Colegrove, a member in 1939–40; Byron Nelson, a member in 1948–49 and 1959; and Peter Masten, a member in 1936 and chairman in 1948–50. The Marshalls were half-

Hoopa, half-Yurok; the others had varying fractions of Yurok and Hoopa blood.

130. The Hoopa Business Council dealt not only with matters affecting the Square but also received delegations of Indians of the Addition and dealt with matters on or arising from the Addition. These matters, arising over the nineteen-thirties and nineteen-forties, included land disputes, expenditures and recommendations for improvement of roads, irrigation facilities and domestic water arrangements, a mineral lease, licenses for Indian traders and mapping along the Klamath River.

131. The council's Indian Court, to which it appointed as the reservation's Indian Judge David Masten, a prominent Yurok Indian (see finding 128, *supra*), passed upon disputes arising on the Addition as well as those arising on the Square, thereby exercising the same all-reservation jurisdiction as did the council itself.

Yurok and Addition Organizations

132. The Yurok Tribal Organization, a California corporation, was formed in 1949 to represent and promote the interests of all persons of Yurok ancestry, a group described as native to and resident of the Klamath River Basin, an area larger than the Addition.

133. A Yurok Indian Club is mentioned in the record in two widely-separated years. Nothing is known of its nature or membership.

134. On September 3, 1955 a constitution was adopted by a group of Indians, presumably Yuroks of the Connecting Strip, establishing an organization called the "Yurok Extension Business Organization," whose members would be Yuroks and which would exercise jurisdiction over the unallotted trust-status lands of the Connecting Strip. The Commissioner refused to approve the organization on the grounds, among others, that the organization would be confused with the "Yurok Tribal Organization" (finding 132, *supra*) and that the membership was limited to Yuroks while not all the residents of the area intended to be represented were Yuroks.

135. In 1961, long after the issue in the instant case had arisen, the Government encouraged the formation of a

"Hoopa Extension Reservation Organization," to exercise jurisdiction over the unallotted trust-status lands on the Connecting Strip. The members of the organization would be allottees on the Connecting Strip, lineal descendants of such allottees, of a specified percentage of Indian blood, and persons who "should have been" allotted. Despite the support of the Indian Office for the adoption of a constitution (which would have accepted the premise of the Government in the instant case of a separation of the rights of the Addition and Square Indians) the constitution was voted down, 110 to 31, the majority being of the opinion that they had a right to be members of an all-reservation group and intended to use legal means to enforce their rights.

1950—The Hoopa Valley Tribe, its Hoopa Valley Business Council and the Official Roll of the Members of the Tribe

136. In 1948, the Hoopa Business Council began formulating a program for the compilation of a current roll of the Indians of the Hoopa Valley Reservation as it originally was created, that is, the Square, for the purpose of controlling the revenues from the resources of the reservation as so defined. The discussions at council meetings of the compilation of the proposed roll, as reported in the minutes of the meetings, reflect a sentiment to exclude from the roll Indians of the Addition.

137. The council approved a form of application for enrollment on the proposed roll, prepared by the chairman and secretary of the council. The form was distributed only in the districts of the council, located in the Square. It was not distributed on the Lower Klamath Strip and the Connecting Strip because it was intended to exclude from enrollment the Indians residing there, unless they could qualify as a descendant of an allottee on the Square.

138. The application form was entitled "Application for Enrollment—Hoopa Valley Reservation—as of November 1, 1948." Inquiry was made on the form only as to the degree of "Hoopa Indian Blood." The application form inquired as to the applicant's justification for applying for enrollment, but did not state the basis upon which the applicant's eligibility for enrollment would be determined.

139. From the Indians who submitted application forms, the Hoopa Business Council prepared a list, entitled Schedule A, of those who had been allotted land on the Square or who were descendants of such allottees, and a list, Schedule B, of eighteen Indians who were not allottees or descendants of allottees on the Square, but were either "true" Hoopa Indians or Indians whom the council felt were entitled to membership in the tribe because their failure to obtain allotments was through no fault of their own.

140. At its meeting on April 6, 1950, the council set an election for May 13, 1950, for the purpose of adopting the schedules which it had prepared as the roll of Indians who would be entitled to share in the revenues from the resources of the original reservation, that is, the Square.

141. A notice was posted, addressed to "The Electors Of The Hoopa Valley Indian Tribe," that the election on May 13, 1950, would have the following purposes: 1) "To determine the minimum degree of Indian blood which a member of the Hoopa Tribe must have to be eligible for Tribal enrollment in the future;" 2) "To adopt a new Constitution and Bylaws for the Tribe;" 3) "To adopt officially into the Hoopa Tribe that certain list, designated as Schedule A, of Hoopa allottees and their descendants, to enable them to share in Hoopa Tribal benefits and moneys;" and 4) "To adopt officially into the Hoopa Tribe that certain list, to be designated as Schedule B, of Indians and their descendants who were not given allotments to enable them to share in Hoopa Tribal benefits and moneys."

The council had stated that persons at least twenty-one years of age, who had made application for enrollment, could be eligible to vote. The notice stated that the electors entitled to vote at the election must be not less than twenty-one years of age and must be on that list of Indians who made application for enrollment into the "Hoopa Tribe" prior to October 1, 1949, and that the list could be seen at the office of the Hoopa Indian Sub-Agency.

142. The "Hoopa allottees and their descendants" referred to in the foregoing notice to electors were the living allottees on the Square and their living descendants who had made application for enrollment and had been placed on Schedule A by the Hoopa Business Council. The Indians on Schedule

B were the eighteen Indians placed on the schedule by the Hoopa Business Council and were stated to be "either true Hoopa Indians" or to be entitled to membership in the tribe "since their failure to obtain allotments was through no fault of their own." The Indians on the list of Indians who made application for enrollment into the Hoppa Tribe prior to October 1, 1949, who the notice stated to be the electors entitled to vote, were not all of the Indians who had made application for enrollment. Rather, the Indians on this list, which the notice stated could be seen at the office of the Hoopa Indian Sub-Agency, were those Indians who had applied for enrollment and who the Hoopa Business Council had found to be allottees or descendants of allottees on the Square. Thus, the Indians on the list of electors and the Indians on the Schedule A to be votėd upon were the same.

143. The electors were not representative of the Indians of the entire Hoopa Valley Reservation in that they did not include (a) Yurok or other non-"true"-Hoopa non-allotted Indians of the reservation, primarily Indians of the Addition, who were not descendants of allottees on the Square, and their descendants; and (b) Indians who had been allotted on the Addition, and their descendants.

144. At the election, held on May 13, 1950, 106 persons voting, the proposed constitution and bylaws was adopted by a vote of 63 to 33.

145. The constitution and bylaws adopted on May 13, 1950 established an organization denominated the "Hoopa Valley Tribe." The membership of this organization is described in Article IV of the constitution as follows:

> Section 1. The membership of the Hoopa Valley Tribe shall consist as follows:
>
> (a) All persons of the Hoopa Indian blood whose names appear on the official roll of the Hoopa Valley Tribe as of October 1, 1949, provided that corrections may be made in the said roll by the Business Council within five years from the adoption and approval of this Constitution, subject to the approval of the Secretary of the Interior or his authorized representative.
>
> (b) All children born to members of the Hoopa Valley Tribe who are at least one-quarter degree Indian blood.
>
> Section 2. The Business Council shall have the power

> to make rules governing the adoption of new members or the termination of membership in the tribe.

146. The constitution and bylaws of May 13, 1950 created an executive body called the Hoopa Valley Business Council and conferred upon the council authority to direct the distribution of the resources of the Square, in addition to the authority (preceding finding) to make the rules governing membership in the "Hoopa Valley Tribe." The assumption of power over the Square was accomplished by Article III, *Territory*, which provided that the jurisdiction of the Hoopa Valley Tribe should extend to the Hoopa Valley Reservation as established by executive order in 1876, that is, the Square:

> The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians of California.

147. Schedules A and B, the tribal roll (findings 139–40, *supra*) were also adopted at the election held on May 13, 1950. Schedule A was adopted by a vote of 17 to 16. The adoption into the tribe of each of the 18 persons on Schedule B was approved by varying majorities.

148. Residence on the Hoopa Valley Reservation was not a requirement for inclusion on Schedule A, the list of allottees and their descendants. "Many" (the word of the Government's District Agent in forwarding the official roll for approval) of the persons on Schedule A were not then residents of the Hoopa Valley Reservation.

149. In June, 1950, a Hoopa Valley Business Council was elected, as provided in the constitution and bylaws.

150. The Hoopa Valley Business Council, although its jurisdiction was by the constitution limited to the Square (finding 146, *supra*) acted upon matters in the other parts of the reservation, as had its predecessor, the Hoopa Business Council (finding 130, *supra*), such as approvals of land selections outside the Square and a right of way for a road outside the Square.

151. On February 1, 1951, the Director of the Sacramento Area Office of the Bureau of Indian Affairs advised the Superintendent of the Hoopa Valley Reservation that the

Indians of the Klamath Strip should be represented on the Hoopa Valley Business Council, as follows:

* * * * *

> It is our opinion that the title status of the main portion of the Hoopa Valley Reservation and that of the Klamath River Strip extending downstream approximately 20 miles from this area is exactly the same, therefore any funds derived from the resources of the Klamath River Strip area should be accredited to the Indians of the Hoopa Valley Reservation. The Indians of the so-called Klamath Strip are, in our opinion, members of the Hoopa Valley Reservation.
>
> We agree with your thought in the second paragraph of your letter that the Indians in the so-called Klamath Strip should have representation on the Hoopa Business Council.
>
> We do not have any contemplated timber sales in this area at the present time, although, as you know, there have been several requests for such sales.

152. (a) On December 6, 1951, the Hoopa Valley Business Council appointed a committee to formulate a plan for the enrollment of additional Indians with the Hoopa Valley Tribe on a "C" Roll.

(b) The "C" Roll committee submitted a report at the March 28, 1952, meeting of the council with a request that the council fix the period of residence on the Hoopa Valley Reservation that would be required for enrollment on the "C" Roll.

(c) A year later, on April 2, 1953, the council established requirements for enrollment on the "C" Roll and set June 2, 1953, as the deadline for the acceptance of applications. These requirements were that an applicant must have resided in Hoopa for a period of 15 years, must have had forebears born on a ranchero on the Square; and must be of at least one-quarter Hoopa blood. On June 10, 1954, the council adopted a resolution declaring eighteen applicants for enrollment on the "C" Roll to be members of the Hoopa Valley Tribe.

153. On March 25, 1952, the Commissioner of Indian Affairs approved Schedules A and B, which had been adopted May 13, 1950 (finding 147, *supra*) and on September 4, 1952, he approved the constitution, with certain exceptions

(withholding approval of a tribal court and requiring that the function of approval of the actions of the council be lodged in the Area Director rather than the Commissioner).

154. By letter dated September 4, 1952, the Commissioner advised the Chairman of the Hoopa Valley Business Council that: "There is no objection to the operation of tribal business in accordance with the Constitution and Bylaws adopted by the Hoopa Valley Indians in a referendum held on May 13, 1950, until such time as this office and the Hoopa Valley Indians can establish suitable organization under provision of the laws of the State of California * * *."

155. On November 6, 1959, the Hoopa Valley Business Council adopted the following resolution defining the criteria which it had employed 6 years earlier in compiling the "C" Roll and purporting to clarify the criteria employed by the former Hoopa Business Council in compiling, some 10 years earlier, Schedules A and B, the so-called "Official Roll of the Hoopa Valley Tribe as of October 1, 1949," as follows:

> Whereas: The absence of written rules and procedures to explain the composition of the "Official Roll of the Hoopa Valley Tribe as of October 1, 1949," also corrections thereto, has been conducive to various interpretations of eligibility requirements, and,
>
> Whereas: Lack of consistent actions in the determination of eligibility of applicants has resulted in charges that the Business Council has not acted in strict accordance with the Constitution and Bylaws of the Hoopa Valley Tribe, and,
>
> Whereas: There is need for an accurate and complete membership roll to be used in conjunction with the allotment program desired by the Hoopa Valley Tribe.
>
> Now therefore be it resolved: That the following definitions accurately describe the procedures followed and clarify the intent not heretofore expressed in the membership requirements as set forth in Article 4 of the Constitution and Bylaws of the Hoopa Valley Tribe approved September 4, 1952:
>
> ### Definitions
>
> 1. Hoopa Valley Tribe
>
> The Hoopa Valley Tribe consists of remnants of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, and Tish-tang-atan Bands of Indians residing

within the twelve-mile square reservation created June 23, 1876, and their descendants.

2. Official Roll of the Hoopa Valley Tribe as of October 1, 1949

"The Official Roll of the Hoopa Valley Tribe as of October 1, 1949" consists of Schedule A captioned "Official Roll as of October 1, 1949, of Members of the Hoopa Valley Tribe Who May Participate in Tribal Benefits and Moneys" and Schedule B captioned "Addition to the Official Roll of Members of the Hoopa Valley Tribe Who May Participate in Tribal Benefits and Moneys" both schedules being approved at a general election on May 13, 1950, and approved by the Commissioner of Indian Affairs on March 25, 1952. Approval of the Schedule B applicants was given by voting on the 18 individuals named on the list.

3. Schedule A.

Schedule A consists of allottees living on October 1, 1949, whose names appear on the J. B. Mortsolf original allotment schedule for the Hoopa Valley Reservation approved March 2, 1922, and descendants of such allottees living on October 1, 1941.

4. Schedule B.

Schedule B consists of applicants living as of October 1, 1949, and filing at the same time as applicants who were included on Schedule A, whose residence within the twelve-mile square area of the Hoopa Valley was not subject to question, who although eligible to have received allotments were never allotted but who were generally considered as members of the Hoopa Valley Tribe and permitted to participate in Tribal Affairs, and their descendants living on October 1, 1949.

5. Corrections.

Corrections to the Official Roll of the Hoopa Valley Tribe as of October 1, 1949 were authorized under Article 4, Section 1(2) during a period of five (5) years ending September 4, 1957. Such corrections applied to: "Persons born not later than October 1, 1949, who qualified by the same requirements as met by persons on either Schedule A or Schedule B comprising the October 1, 1949 roll, whose applications were filed within the five year period ending September 4, 1957."

6. Schedule C.

Pursuant to authorization contained in Article 4, Section 2 of the Constitution and Bylaws a schedule C application procedure was devised. A Schedule C applicant was required to have resided within the Hoopa Valley Reservation for a minimum of 15 years, to have had forebearers born within the twelve-mile square Hoopa Valley Reservation, to have had at least 1/4 degree Hoopa blood or have been a legally adopted child having at least 1/4 degree Indian blood and to have filed an application within a sixty(60) day period ending June 2, 1953.

7. Children.

"Children" as used in Article 4, Section 1 (b) is restricted to persons born after October 1, 1949.

Procedures

The C Schedule established certain specific requirements to be met by those persons who were ineligible for enrollment under the requirements of Schedule A and Schedule B. Eligibility was determined on an individual basis and did not automatically pass from a parent to a child born prior to October 1, 1949. However, once an individual was approved for membership as a C Schedule applicant, he acquired the same rights and privileges as other enrolled members.

156. The following month, on December 11, 1959, the Hoopa Valley Business Council adopted a resolution amending the resolution of November 6, 1959, purporting again to clarify the criteria employed by the former Hoopa Business Council in compiling Schedule A, which with Schedule B comprised the so-called "Official Roll of the Hoopa Valley Tribe as of October 1, 1949". This resolution amended definitions 2 and 3 of the prior resolution (preceding finding) to read as follows:

2. Official Roll of the Hoopa Valley Tribe as of October 1, 1949.

The Official Roll of the Hoopa Valley Tribe as of October 1, 1949 consists of Schedule A and Schedule B, as herein defined, both schedules being approved at a general election on May 13, 1950, and by the Commissioner of Indian Affairs on March 25, 1952.

3. Schedule A.

Schedule A consists of allottees living on October 1, 1949, and descendants of allottees living on October 1, 1949.

1917-1958—Proceeds of the Sale of the Lands of the Old Klamath River Reservation

157. The 1892 act which provided for the sale of the lands of the Klamath River Reservation (finding 77, *supra*) provided, also, that the proceeds of the public sale of lands were to be a fund used by the Secretary of the Interior for the "maintenance and education" of the resident Indians. In 1917 the statute was amended to add to these purposes "the *pro rata* improvement of individual Indian allotments" and "the construction of roads, trails, and other improvements for their benefit." Act of March 2, 1917, 39 Stat. 969, 976.

158. The proceeds of the public sale of lands of the old Klamath River Reservation were held in a Treasury account entitled "Proceeds of Klamath River Reservation," and interest on the sums therein was credited to an interest account with the same name.

159. In 1918 a road costing approximately $16,000 was built through the area of the old Klamath River Reservation with the use of funds from the account "Proceeds of Klamath River Reservation." While the work was underway, Congress enacted general legislation that tribal funds could be spent only pursuant to a specific appropriation. Sec. 27, Act of May 18, 1916, 39 Stat. 123, 158. Thereafter $3,215.12 was expended by the Superintendent to complete the road, without such an appropriation. In 1920 Congress, after the fact, authorized payment of this sum in the Act of February 14, 1920, 41 Stat. 408, 418, as follows:

> That the Secretary of the Interior and the Secretary of the Treasury be, and they are hereby, authorized to allow payment of an indebtedness amounting to $3,215.12 incurred by the Superintendent of Hoopa Valley Agency, California, during July, August, and September, 1918, in the construction of a trail on the Klamath River Reservation, from the tribal fund known as "Proceeds of Klamath River Reservation, California," which was made available for that and other purposes by the Act of March 2, 1917 (Thirty-ninth Statutes at Large, page 976), but from which no expenditures were authorized by section 27 of the Act of May 25, 1918 (Fortieth Statutes at Large, page 591.)

160. On December 31, 1942 Superintendent Boggess requested authorization of an expenditure of $200 from "the tribal fund of the Lower Klamath Indians" (by which he apparently meant the account "Proceeds of Klamath River Reservation"), as distinguished from what he characterized as the "tribal fund of the Hoopa Valley Indians" (by which he presumably meant the all-reservation fund in the account "Proceeds of Labor, Hoopa Valley Indians," finding 167, *infra*), for the expenses of a visit by a committee of Lower Klamath Indians to the State legislature to seek a bill reimbursing the Indians for losses by a closing of the river to fishing in 1933.

161. As of March 19, 1947 there was $5,107.35 in the account "Proceeds of Klamath River Reservation" and $3,204.10 in the parallel interest account.

162. On March 19, 1947 the Superintendent reported with his recommendation for approval a "request from the tribal council of this area" for an allotment of $300 from the interest account to pay the costs of a trip to Sacramento in re the "Claims of California Indians." (There was no such council. The record shows only a resolution requesting such an allotment, passed 25 to 0 "[a]t a meeting of the Yurok Indians of the lower Klamath River held at Klamath California on March 23, 1947.")

163. A letter from the Sacramento Area Office of the Bureau of Indian Affairs dated February 3, 1954 addressed to the secretary of the "Yurok Tribal Organization" (finding 132, *supra*), stated that the office had been allotted $1,000.00 of "Yurok Tribal funds," presumably funds in the account "Proceeds of Klamath River Reservation" for the program submitted by the secretary, including travel expenses of tribal delegates.

164. On September 19, 1934, by Department order in the Department of the Interior, such of the land on the former Klamath River Reservation as had been opened for public settlement under the provisions of the Act of June 17, 1892, (finding 77, *supra*) but which had not been settled upon, was withdrawn from disposition pending possible restoration to tribal ownership. By a subsequent order on November 5, 1935, this land was continued in a state of withdrawal.

165. The withdrawal from sale of unsold lands of the former Klamath River Reservation (preceding finding) was made permanent in 1958. The Act of May 19, 1958, 72 Stat. 121 provided for the restoration of tribal ownership of 159.57 acres of land on the reservation at Klamath River, California and of other, larger tracts on other reservations. Title to "the lands restored to tribal ownership" was to be in the United States in trust for "the respective tribe or tribes" and the various tracts were "added to and made a part of the existing reservations for such tribe or tribes."

1955—Payment by the Government of the Income from the Square Exclusively to Persons on the Official Roll of the Hoopa Valley Tribe

166. In 1951, the Sacramento Area Director of the Bureau of Indian Affairs (apparently the Commissioner's delegate in such matters (see finding 153, *supra*)) advised that any funds derived from the resources of the Klamath River Strip area of the reservation should be credited to the account of the Indians of the Hoopa Valley Reservation. His letter is quoted in finding 151, *supra*.

167. Until 1955, any revenues from both parts of the Hoopa Valley Reservation—the Square and the Addition—were deposited in a single United States Treasury Account, No. 14X7236, entitled "Proceeds of Labor, Hoopa Valley Indians." The interest derived from the funds in this account was credited to United States Treasury Account No. 14X7736, entitled "Interest on Proceeds of Labor, Hoopa Valley Indians." Disbursements were made from these accounts for improvements on all parts of the reservation.

168. Although all the revenues from the reservation went into one account (preceding finding), Superintendent Boggess seems to have sought to relate the benefits from expenditures to the place of the source of the funds being expended. Thus, at a time in 1938 when the total revenues in Account No. 14X7236 derived from outside the Square were $2,511.45, of which $2,263.80 had been derived from a contract with a lumber company to cut timber at Johnson's Village on the Connecting Strip, Superintendent Boggess planned to spend only $2,263.80 for water developments at Johnson's Village, as "the amount received from the sale of cedar in that locality," though the appropriation for the water development at

Johnson's Village was $2,500.00. Actually, additional sums of $187.70 and $53.04 in the account had also been derived from the cutting of timber on unallotted trust-status tribal land at Johnson's Village.

169. On April 23, 1954 the Area Director of the Indian Bureau at Sacramento requested the establishment of an account for depositing "receipts to the credit of the Yurok Indians of California." The response of the Fiscal Section, dated April 29, 1954 listed five reservations in which "different groups of Yurok Indians resided"; on the list were "Hoopa Valley Reservation" and "Klamath River Reservation." On July 1, 1954 the Director of the Division of Budget and Finance in the Office of the Secretary requested the Treasury to establish two accounts as follows:

147153	Deposits, Proceeds of Labor, Yurok Indians of Lower Klamath River, California.
147154	Deposits, Proceeds of Labor, Yurok Indians of Upper Klamath River, California.

Trust fund receipt, appropriation and interest accounts were opened, one each for the "Yurok Indians of Lower Klamath River," all ending in the number 53, and one each for the "Yurok Indians of Upper Klamath River," all ending in the number 54.

170. Commencing in 1955, revenues derived from the resources of the Connecting Strip were credited to Account No. 14X7154, "Proceeds of Labor, Yurok Indians of Upper Klamath River, California" and revenues derived from the resources of the Lower Klamath River strip were credited to Account No. 14X7153, "Proceeds of Labor, Yurok Indians of Lower Klamath River, California." As of 1969 approximately $72,070 had been credited to Account No. 14X7154, and $3,956 to Account 14X7153. Revenues derived from the resources of the Square continued, as before, to be credited to the accounts for the benefit of the "Hoopa Valley Indians" (finding 167, *supra*). The major portion of these revenues has been from timber sales.

171. Beginning in 1955 and continuing to the present time, the Secretary of the Interior, upon requests made by resolutions of the Hoopa Valley Business Council, has each year disbursed, from the accumulated income in Account No. 14X7236 and its interest Account No. 7736 for the Hoopa

Valley Indians (finding 167, *supra*), per capita payments to the Indians on the official roll of the Hoopa Valley Tribe organized pursuant to the constitution and bylaws adopted at the election of May 13, 1950 (findings 136 *et seq.*, *supra*).

172. The total of the per capita payments through February 1969 was $12,657,666.50. The payments were made at the following times and in the following amounts:

Payment period	Total amt. each payment	Amt. paid each indiv.
#1 Jan 1955	$76, 500	$100
Suppl. Aug 1955	1, 600	
Suppl. Apr 1956	1, 900	
#2 Sept 1955	$158, 600	$200
Suppl. Dec 1955	10, 600	
#3 Jan 1956	$255, 600	$300
Suppl. Jan 1957	3, 600	
#4 Oct 1956	$178, 600	$200
#5 Apr 1958	$277, 500	$300
Suppl. Mar 1959	4, 200	
Suppl. Apr 1959	300	
#6 Dec 1958	$265, 100	$275
#7 Apr 1959	$261, 630	$270
Suppl. Aug 1959	270	
#8 Dec 1959	$275, 942	$281
#9 Apr 1960	$275, 931	$279
#10 Dec 1960	$458, 304	$448
#11 Apr 1961	$459, 096	$444
#12 Dec 1961	$382, 320	$360
Suppl. Apr 1962	720	
Suppl. June 1962	1, 800	
#13 Apr 1962	$381, 625	$355
Suppl. June 1962	1, 775	
Suppl. Apr 1962	1, 420	
#14 Dec 1962	$479, 600	$436
#15 Apr 1963	$480, 630	$433
#16 Dec 1963	$703, 425	$622. 50
#17 Apr 1964	$703, 700	$620
#18 Dec 1964	$625, 240	$539
#19 Feb 1965	$625, 937	$541
#20 Dec 1965	$604, 237. 50	$512. 50
#21 Apr 1966	$605, 695	$512
#22 June 1966	$696, 000	$600
#23 Dec 1966	$534, 600	$445. 50
#24 Mar 1967	$534, 417. 50	$443. 50
#25 Oct 1967	$233, 530	$193
#26 Nov 1967	$233, 530	$193
#27 Feb 1968	$233, 593	$191
#28 June 1968	$233, 593	$191
#29 Aug 1968	$465, 129	$374. 50
#30 Nov 1968	$465, 129	$374. 50
#31 Feb 1969	$464, 746. 50	$371. 50
	$12, 657, 666. 50	$11, 405. 50

173. The Secretary of the Interior has refused and has continued to refuse to distribute any income derived from the Square portion of the Hoopa Valley Reservation to any Indians of the Hoopa Valley Reservation other than those who are members of the Hoopa Valley Tribe according to its official roll.

174. In 1958 the Deputy Solicitor of the Department of the Interior ruled that "no Indians other than those enrolled as members of the Hoopa Tribe of the original 12-mile square reservation and their descendants, have rights of participation in the communal property on that part of the Hoopa Valley Reservation." 65 Dec. Dept. Int. 59, 68 (1958). Making no reference to the presence of Klamaths on the Square, he held that the Hoopas had exercised jurisdiction over the Square from earliest times and that their rights were vested by 1891. The executive order of that year he held to have been merely "an aid to the administration of these two separated areas" and as making the former Klamath River Reservation and the Connecting Strip a part of the enlarged Hoopa Valley Reservation only "technically." 65 Dec. Dept. Int. at 63, 64.

The Government does not in the instant case contend either that this opinion has any binding force or that it is correct in its facts. The opinion does not reflect the facts set out in these findings, primarily the presence of Klamaths on the Square from aboriginal times continuously to 1891 and beyond; moreover, it contains errors of commission and omission, among them the impression given throughout that the Hoopas were the sole occupants of the Square, from the time before the first location of the reservation in Hoopa Valley; that the tribal council on the Square was a permanent institution from 1916 (65 Dec. Dept. Int. at 62; compare findings 109–112, *supra*); the impression given that Chief Clerk Hauke's letter of July 17, 1916, was an approving response to the council's letter of June 19, 1916 (65 Dec. Dept. Int. at 66; see finding 102, *supra*); and the statement that the allotments approved on the Square were submitted by the Hoopa Tribal Council (65 Dec. Dept. Int. at 67; compare findings 86–97, *supra*).

Ultimate Findings and Conclusions on the Common Issue of the Exclusive Rights of the Hoopas in the Square

175. Under the Act of April 8, 1864, authorizing the President to set apart and locate not more than four reservations in California, at least one to be in the northern district, of such size as he found suitable, for the accommodation of the Indians of California, without specification of the tribes to be so accommodated, the President had discretion to authorize any Indian tribes of California to reside upon such reservations as he set apart. No Indian tribe resident upon a reservation created under the act could obtain vested rights to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation. *Healing* v. *Jones*, 210 F. Supp. 125, 138, 153, 170 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963); *Healing* v. *Jones*, 174 F. Supp. 211, 216 (D. Ariz. 1959); *Crow Nation* v. *United States*, 81 Ct. Cl 238, 278 (1935).

176. Superintendent Wiley's public notices of August 21, 1864 and February 18, 1865 (findings 13, 21, *supra*) locating the Hoopa Valley Reservation on the tract thereafter called the Square, were issued pursuant to the authority of the act of 1864 and subject to Presidential approval and, having made no mention of any Indian tribe, provisionally established the reservation for such Indians or tribes as might be settled or reside upon it with Presidential authority.

No tribe settled upon or residing upon the reservation pursuant to the notices could, in view of the grant of discretionary authority by the act of 1864 to the President, obtain vested rights in the Square to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation.

177. The so-called "treaty" made at Hoopa Valley in 1864 (finding 15, *supra*), said to be the source of the Hoopas' rights in the Square, is concededly not a binding treaty in the constitutional sense. An agreement by an executive officer could not foreclose the President's authority under the act of 1864 to establish a reservation for such Indians as might be settled there with his approval, and thereafter to enlarge the reservation for the common benefit of the Indians of the added lands and of the original reservation.

178. Any rights to Hoopa Valley given by the treaty to the Hoopas were given equally to other tribes as well, including the Klamaths. The treaty was either made with a number of tribes including the Klamaths or the Klamaths became entitled to its benefits, in accordance with Section 1, Article 1 of its text (finding 15, *supra*), when they laid down their arms and lived in peace with the Government, or both.

179. The Hoopas were not the sole occupants of the Square, either in aboriginal times or thereafter. While the Hoopa Valley was the native territory of the Hoopa Indians, there were native villages of the Yuroks on the Square, in the canyon north of the valley proper, near the junction of the Trinity with the Klamath River, and nearby at a small distance from the river. At about the time of the aforesaid notices by Superintendent Wiley and thereafter, the residents of the valley included at least Hoopa, Klamath, and Redwood or Chilula Indians.

180. The evidence is abundant that the reservation was intended, from the outset, for the accommodation of numbers of tribes of Northern California, including the Klamaths, such as might reside there with Presidential approval, and that Wiley, his successor and the officers of the Indian Office throughout recognized the rightful presence on the Square of a number of tribes (until the opinion of the Deputy Solicitor, in 1958 (finding 174, *supra*), approving the action of the Secretary of the Interior complained of in this case).

181. President Grant's order of June 23, 1876, establishing the Hoopa Valley Reservation "as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864" (finding 29, *supra*), established the reservation not for any specific tribe or tribes, none having been mentioned in the order, but for such tribes as might reside or settle there, then or thereafter, with the approval of the President, and the tribes as were then resident upon it were subject to further exercise of Presidential authority under the act with respect to the reservation.

182. The residents of the reservation at the time of President Grant's order included Hoopas, Klamaths, Saiaz and Redwoods. Still others (besides bands or sub-groups of

Hoopas) had been settled there between 1864 and 1876, but have not been identified as remaining there in 1876.

183. President Harrison's order of October 16, 1891 (finding 33, *supra*), extending the boundaries of the Hoopa Valley Reservation to include the former Klamath River Reservation and the connecting strip of land between the two reservations, was a lawful exercise of the President's "continuing authority" under the act of 1864, and "large discretion about exercising it," "to alter and enlarge the [reservation] from time to time in the light of experience." *Donnelly* v. *United States*, 228 U.S. 243, 256–57 (1913).

The words of the executive order "extended" the "limits" of the Hoopa Valley Reservation, "a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart * * * by Act of Congress approved April 8, 1864" "so as to include" the Addition, with the proviso that tracts to which valid rights had attached under the laws of the United States were "excluded from the reservation as hereby extended."

The plain and natural effect of the order was to create an enlarged reservation in which the Indians of the original reservation and the Indians of the added tracts would have equal rights in common. Cf. *Halbert* v. *United States*, 283 U.S. 753 (1931); *Quinaielt* v. *United States*, 102 Ct. Cl. 822 (1945). In extending the boundaries of the Square to include the Addition, peopled by Yurok Indians of Northern California, the executive order was patently carrying out the purpose of the act of 1864 to provide a reservation or reservations in the northern district of California for the accommodation of the Indian tribes of the region.

184. An exhaustive study of the background of the executive order of 1891 and of the legislative origins of the Act of June 17, 1892 (27 Stat. 52), providing for allotment and sale of the Klamath River Reservation, shows no sign of a plan, intention or understanding, executive or Congressional, such as is claimed by defendant to have existed, that the executive order of 1891 should join the Klamath River Reservation and the Connecting Strip to the Square for administrative or "technical" purposes only—as separate reservations without effect on the substantive rights of the Indians of the Square, or otherwise than as a single, integrated reservation in which

all the Indians of the reservation as enlarged should have equal substantive rights. The intention defendant contends for is not once articulated in the voluminous history. No fact in the history, moreover, supports the assertion that the executive order was intended for convenience in administration only and without effect on substantive rights.

185. It quite clearly appears that the intended purpose of the executive order was to accomplish just such an enlargement of the Hoopa Valley Reservation as would bring about a single, enlarged, integrated reservation, effective upon substantive rights.

Soon before the issuance of the executive order, the courts had held that the Klamath River Reservation had been abandoned as a reservation and had accordingly refused to punish white traders who entered the reservation area. Also, bills were steadily being proposed to Congress for the public entry and sale of the lands of the Klamath River Reservation. Some of these bills forbade allotment of lands thereon to the Indians as their homes and directed the removal of the resident Indians to the Hoopa Valley Reservation. The Department of the Interior opposed these bills unless they were amended to permit allotment. The Department had two objectives in mind—to allot lands in severalty to the Indians of the Klamath River Reservation and of the Connecting Strip (together constituting what became the Addition), and to expel traders from the Klamath River Reservation. Reservation status for the Addition would achieve both objectives. Only the incorporation of the Klamath River Reservation into an existing reservation would do, for the maximum of four reservations authorized by the act of 1864 had already been created. Incorporation of the Klamath River Reservation and the Connecting Strip into the adjoining Hoopa Valley Reservation was the natural solution; it had been recommended and considered for years before.

Joinder of the Klamath River Reservation to the Hoopa Valley Reservation for administrative purposes only or for less than all purposes would have jeopardized the achievement of the desired objective, in view of the necessity that the executive action pass muster with both courts and Congress, which were both already of the view that Klamath River Reservation had been abandoned, for failure of the executive to incorporate it into one of the four existing reservations. As for the Connecting Strip, it had never had reservation status, and it could not get such status by a joinder to the Hoopa Valley Reservation "for administrative puposes only" but only by an incorporation, for all purposes, into a lawful reservation. No limitation whatsoever was, therefore, intended or imposed on the natural legal consequence of the incorporation of the Addition into the reservation.

The intention to affect substantive rights is confirmed by the explicit exception, in the text of the executive order (finding 33, *supra*), "from the reservation as hereby extended," of any tract within the Addition to which valid rights under the laws of the United States had already attached. All else was to become part and parcel of the Hoopa Valley Reservation.

The materials cited by defendant do not prove, as claimed, that Congress understood the executive order otherwise or that Congress understood that the reservation was enlarged in such a manner as not to affect the common rights of the Indians of the enlarged reservation in the communal property of all parts of the reservation.

Almost immediately following the executive order, Congress on June 17, 1892 enacted a bill for the allotment of lands on the Klamath River Reservation, to be followed by the public sale of the remaining land, the proceeds of sale to be a fund for the benefit of the Indians of the reservation (finding 77, *supra*). Bills of this nature had been considered for many years on the premise that the Klamath River Reservation was abandoned (see findings 50–77, *supra*); the proponents were not about to make their cause less attractive by amending the name of the reservation to be sold to call it the "former Klamath River Reservation, now part of the Hoopa Valley Reservation." Therefore neither the apparent disregard in the bill of the effect of the 1891 executive order on the Klamath River Reservation (perhaps in fact an ignorance of the issuance of the executive order) nor the continued existence of the fund of the proceeds of sale for the benefit of the Indians of the "Klamath River Reservation" tends to show any such Congressional understanding of the executive order as defendant contends for, or, indeed, a Congressional understanding of any kind concerning the executive order.

The fact is that the act of 1892, the administration over the years of the fund created by the act and the more recent legislative and executive postscript dealings with the "Klamath River Reservation" (findings 157–165, *supra*) were not intended or understood by their draftsmen and makers to have any bearing on the rights of the residents of the Hoopa Valley Reservation as extended by the 1891 executive order. Those men simply did not have the Hoopa Valley Reservation in mind (see finding 77, *supra*); there was no need that they should.

186. The highly complex program for allotments on the Hoopa Valley Reservation which extended from about 1890 to 1930 (findings 78–100, *supra*), too, shows no trace of such a plan, intention or understanding as defendant claims underlay the executive order of 1891. The references to the separate parts of the reservation, in the texts of the instructions to the allotting agents, were simple matters of convenient naming of the three areas of the reservation to be allotted and are wholly immaterial to show a division of the reservation into separate parts for substantive purposes. The restriction of allotments on the Lower Klamath Strip to residents of the Old Klamath River Reservation was the requirement of the act of 1892 (finding 77, *supra*), providing for allotments on that reservation before public sale, reinforced by the provisions of the General Allotment Act of 1887 (finding 59, *supra*). When the question arose of the rights of Indians of the Addition to allotment on the Square, under the executive order of 1891, the Commissioner in 1933 ruled that all Indians of the reservation, Addition and Square, were equally entitled to allotment on the Square (finding 96, *supra*).

The allotment program was marked by other administrative rulings as well, by high and low ranking officials, confirmatory of plaintiffs' position herein. See findings 101–108, *supra*. A notable such ruling was made by Chief Clerk Hauke in 1916 when he gave the opinion (finding 102, *supra*) that not the Hoopas alone but a number of tribes including the Klamaths were entitled to recognition as Indians of the reservation and, therefore, to enrollment upon the reservation and, ultimately, to allotment.

187. The facts of the organizations of Indians on the reservation, prior to the organization of the Hoopa Valley Tribe in 1950 to claim exclusive rights to the Square, are inconclusive and therefore immaterial on the issue presented. The ad hoc tribal council of 1916 was directed by the Indian Office to be representative of all the tribes on the reservation, including Klamaths, but in fact the council was composed of residents of the Square and though it contained a Klamath among its members unanimously petitioned Washington to exclude Klamaths from eligibility to allotment on the Square. The tribal council created in 1933 was ordered by one Commissioner to be representative of all the tribes on the reservation, but his successor (unknowingly, on the proof here made) approved a council representative of the Square only. And that council proceeded to exercise jurisdiction, both legislative and judicial, over the entire reservation, Square and Addition. Though the council was representative of the Square or the "Hoopa tribe" only, for years at a time Yuroks were its members and chairmen. Even the council's Indian judge, who heard cases arising all over the reservation, was a Yurok (who had been allotted on the Connecting Strip and was a resident of the Square).

188. Nothing appearing to the contrary, and a great deal appearing in support, it is concluded that the effect of the executive order of 1891 was that all the Indians of the reservation as thereby extended—Addition and Square—got equal rights in the enlarged reservation and thus that the rights of Indians of the Addition are equal to those of the Indians of the Square, the Hoopa Valley Tribe or any other Indians of the reservation.

189. It follows that defendant acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands on the Square. Such of the plaintiffs as are found herein to be Indians of the reservation will become entitled to share in the income from the entire reservation, including the Square, equally with all other such Indians, including the Indians of the Square.

Findings on the Individual Plaintiffs

190. The data in this finding were used in determining whether the residences and birthplaces of the individual plaintiffs were on or off the reservation. The data did not clarify all the cases and in the further proceedings it should be made clearly to appear whether birthplaces and residences are located on or off the reservation.

Villages of the reservation are:

Lower Klamath Strip:

- Requa or Rekwoi
- Klamath
- Hoppaw or Hopau
- Waukel or Wohkel
- Scaath
- Turwar or Terwer
- Starwein Flat
- Suppur, Serper or Surpur

Connecting Strip:

- Johnson's Village or Wauteck
- Cautep or Kotep
- Pecwan or Pakwan
- Yocktar or Yockta—Donley's Prairie
- Schragoine or Surgone, Seragoine, Sregon
- Mettah or Meta
- Natchka or Natchko
- Moreck or Murek
- Cappell or Kepel
- Waase or Waasa or Whusi
- Mareep or Merip
- Kanick or Kenek
- Waseck, Wahsek or Waseek
- Martins Ferry
- Weitchpec, Wetchpeck or Weitspus

The Square:

- Northern Part: Pectah, Pactaw or Pektul
- Valley:
  - Norton Ranch
  - Mescat, Mascat, Miskut or Meskut Village
  - Soctish Ranch
  - Takinitlding Village, Hostler or Hosler
  - Tsewenalding or Senalton Village
  - Matilton or Medilding Village
  - Kentuck or Howunkut Village
  - Campbell Ranch
  - Tishtangatang or Djishtangading Village
  - Bennets Ranch
  - Spencers Ranch
  - Jackson Ranch

191. *Jessie Dorothy Bristol Alameda.* Born 1918; ¾ blood Indian (½ Yurok, ¼ Hoopa). Born on the Connecting Strip and schooled there and on the Square. Has lived on the Square full time since 1928. Listed in the reservation censuses from 1919 to 1940, the year of the last complete census. (Entitled to recover as an Indian of the reservation.)

192. *Louisa Dowd Wilder Ames.* Born 1889; ½ blood Indian (¼ Hoopa, ¼ Yurok). Born on the Connecting Strip and schooled there and on the Square. Lived off the reservation from the time she first married, at a date which does not appear, to 1964. Has lived on the reservation since then. Was allotted on the Connecting Strip and was listed in all censuses from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

193. *Rethema Billy Peters Pollock Barber.* Born 1913; full-blooded Indian (Yurok). Born on the Square and lived there until she was 8, when she moved with her family to her grandmother's allotment on the Connecting Strip. Lived on the Connecting Strip to a date later than 1922, lived on the Square between 1936 and 1939, and now lives on the Connecting Strip. She has held an assignment of land on the Square, later transferred to her daughter, and was listed in the censuses from 1914 to 1940. (Entitled to recover as an Indian of the reservation.)

194. *Lulu Smith Donnelly.* Born 1883; full-blooded Indian (Yurok). Born on the Connecting Strip and lived there until 1966. Since then has lived off the reservation. Allotted on the Connecting Strip and listed in the censuses from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

195. *Frank A. Donley*, also known as Frank Douglas. Born 1891; ½ blood Indian (Yurok). Born on the Connecting Strip and lived there for 50 years. Now lives on the Lower Klamath Strip. Allotted on the Connecting Strip. Listed in the censuses for 1894, 1900, and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

196. *Ollie Roberts Sorrell Foseide.* Born 1921: full-blooded Indian (⅞ Yurok, ⅛ Hoopa). Born on the Connecting Strip, lived there and schooled there and on the Square. Has lived on the Lower Klamath Strip and on the Connecting Strip.

She was listed on the censuses from 1921 to 1940. (Entitled to recover as an Indian of the reservation.)

197. *Ella Steve Hostler Johnson.* Born 1900; full-blooded Indian (Yurok). Born on the Connecting Strip. Lived on the Square from 1916 to 1933 and thereafter on the Connecting Strip. She selected lands on the Square; the selection was later transferred to one of her sons. Two of her sons and her husband were allotted lands on the Square. She was listed on the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

198. *Henrietta Wilma Masten Lewis.* Born 1942; ⅝ blood Indian (Yurok). Born off the reservation. Her father was ¼ Indian (Yurok) and her mother was 100% Yurok, a native of the Connecting Strip. The plaintiff was born after the last complete census. Both her parents were listed on the censuses from 1920 to 1940. Schooled on the reservation. Has lived "most of her life" on the Connecting Strip. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss the effect of birth off the reservation as affecting status, and the facts as to duration of residence off the reservation, and their significance.)

199. *Llewellyn Markussen.* Born in 1932; ¾ blood Indian (½ Yurok, ¼ Karok). Born on the Square and lived there as an infant. From the age of 4 in 1936 until 1961 he lived on his mother's assignment on the Square. Since then he has lived on the Connecting Strip. He was omitted from the censuses because his mother had never been listed. His mother was on her application enrolled as an Indian of the reservation in 1936 and was thereafter listed. (Entitled to recover as an Indian of the reservation.)

200. *Theresa Billy Mitchell.* Born 1891; full-blooded Indian (Yurok). Born on the Connecting Strip, lived on the Square as a child and since then has lived, for more than 50 years, on the Connecting Strip, where she was allotted. Listed in the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

201. *George McCovey, Sr.* Born 1917; ¾ blood Indian (Yurok). Born and schooled on the Connecting Strip. Lived on the Square from the time he was married in 1937 to 1969, when he returned to the Connecting Strip where he now lives.

Listed in the censuses from 1918 to 1940. (Entitled to recover as an Indian of the reservation.)

202. *Myrtle Smoker McCovey.* Born in 1899; full-blooded Indian (Yurok). Born on the Connecting Strip and schooled there, on the Square and elsewhere. Lived on her grandmother's allotment on the Lower Klamath Strip from 1919 to 1964 and then moved to Klamath Glen, apparently also on the Lower Klamath Strip. She was listed on the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

203. *Sadie Jones McCovey.* Born 1891; full-blooded Indian (Yurok). Born on the Connecting Strip and lived there. Schooled there and on the Square. Has lived with her husband on his allotment on the Connecting Strip since her marriage in 1915. Has been listed on the censuses from 1915 to 1940. (Entitled to recover as an Indian of the reservation.)

204. *Antone Obie.* Born 1890; full-blooded Indian (Yurok). Born on the Connecting Strip where he lived until 1964 and where he was allotted. In 1964 he moved to Hoopa where he now lives. Listed in the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

205. *Erick William Pearson, Jr.* Born 1931; ⅜ blood Indian (Yurok). Born in Lassen County, California of parents one of whom was a non-Indian and the other a ¾ Indian (Yurok) native of the Square. He came to the Square at the age of 2, in 1933, and lived on land assigned to his mother in 1935. Moved in 1937 to a tract on the Square bought by his mother. Has lived on the Square since, except for military service between 1949 and 1951. He was listed on the 1940 census. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss the effect of birth off the reservation as affecting status.)

206. *Frances James Roberts.* Born 1898; full-blooded Indian (¾ Yurok, ¼ Hoopa). Born on the Connecting Strip and has lived on the Square, the Connecting Strip, and the Lower Klamath Strip. Listed on the censuses for 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

207. *Josephine Cooper Robinson Rogers Ludington Robinson.* Born 1896; ¾ blood Indian (½ Yurok, ¼ Wintun).

Born on the Square and lived on the Connecting Strip (except for a "short time" during her marriage) until 1959 when, apparently, she moved to Eureka, off the reservation. She had been omitted from the census and successfully applied for enrollment in 1933, whereupon she was able to accept an assignment on the Connecting Strip. She was listed on the censuses from 1934 to 1940. (Entitled to recover as an Indian of the reservation.)

208. *Alta Mae Kane Rogers.* Born 1933; full-blooded Indian (½ Yurok, ½ Paiute). Born on the Square and lived there and on the Connecting Strip until 1939 when she moved to her father's reservation, the Bishop Indian Reservation. In 1953 she married and, with her husband, moved to the Connecting Strip and lived there until about 1966 when she and her husband moved to Bishop, California. Occasionally visits her cabin on the reservation. She was listed on the censuses from 1933–1940. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss whether claimant has dual tribal status and, if so, the effect on the issue in the case.)

209. *Florence Gensaw Green Shaughnessy.* Born 1902; ½ blood Indian (Yurok). Born on the Lower Klamath Strip and has lived there for 60 years except for "intermittent" periods of residence in the Humboldt Bay Area. Listed in the censuses 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

210. *Jessie Quinn McCoy Short.* Born 1905; ½ blood Indian (¼ Hoopa, ¼ Yurok). Born on the Connecting Strip and lived there as a child and after schooling at Hoopa. Presently resides off the reservation. Listed on the censuses 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

211. *Sam Smoker.* Born 1904; ¾ blood Indian (Yurok). Born on the Square and schooled there and on the Lower Klamath Strip. Has lived on the Square from 1914 to the present. He received a tract of land by assignment in 1935. Listed on the censuses 1910 through 1918. He was thereafter omitted until his application for enrollment was made and approved in 1932. Thereafter he was again listed, from 1932 through 1940. (Entitled to recover as an Indian of the reservation.)

212. *Elwood Theodore Swanson.* Born 1926; 1/8 blood Indian (Hoopa). Born off the reservation. Lived part time with his grandmother at Hoopa from the time he was 8. At an unstated time his family moved to Hoopa and he completed grade and high school there; in that period he participated in Hoopa tribal ceremonial dances. He lived on the reservation until his military service; thereafter lived at his birthplace off the reservation. He inherited interests in three allotments on the reservation and sold them. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss the effect of birth off the reservation as affecting status.)

213. *Oscar Lawrence Taylor.* Born 1908; half-blood Indian (Yurok). Born on the Lower Klamath Strip, schooled there and at Hoopa. Since then has lived on the Lower Klamath Strip and for a time on the Connecting Strip, except when he was working off the reservation. Listed on the census rolls from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

214. *Harry D. Timm Williams.* Born 1924; half-blood Indian (Yurok). Born on the Lower Klamath Strip and lived there through high school until 1941 when he moved to the San Francisco area where he took university extension courses. Spends weekends and vacations with his family on the reservation. Listed on the censuses 1930 through 1940. (Entitled to recover as an Indian of the reservation.)

215. *Christopher Young.* Born 1897; half-Indian (Yurok). Born on the Connecting Strip and has lived there all his life. Presently lives there. Listed in the censuses 1900 and 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

216. *Laura Mareep Sam Billy Young.* Born 1891; full-blooded Indian (Yurok). Born and has lived on the reservation all her life, except while attending an Indian school. Listed on the censuses in 1900 and 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

Ultimate Findings and Conclusions on the Individual Claims

217. Plaintiffs Louisa Dowd Wilder Ames, Jessie Dorothy Bristol Alameda, Rethema Billy Peters Pollock Barber, Lulu

Smith Donnelly, Frank A. Donley, Ollie Roberts Sorrell Foseide, Ella Steve Hostler Johnson, Llewellyn Markussen, Theresa Billy Mitchell, George McCovey, Sr., Myrtle Smoker McCovey, Sadie Jones McCovey, Antone Obie, Frances James Roberts, Josephine Cooper Robinson Rogers Ludington Robinson, Florence Gensaw Green Shaughnessy, Jessie Quinn McCoy Short, Sam Smoker, Oscar Lawrence Taylor, Harry D. Timm Williams, Christopher Young, and Laura Mareep Sam Billy Young are entitled to recover, as Indians of the Hoopa Valley Reservation, an aliquot share in the revenues of the unallotted trust-status lands of the entire reservation, in an amount to be determined in proceedings under rule 131(c), the amount of recovery to be determined following trial of the claims of the remaining plaintiffs.

218. The claims of plaintiffs Henrietta Wilma Masten Lewis, Erick William Pearson, Jr., Alta Mae Kane Rogers and Elwood Theodore Swanson are set down for retrial.

CONCLUSION OF LAW

The court adopts and makes part of its judgment the foregoing findings of fact and ultimate findings and conclusions. Certain of the plaintiffs are entitled to recover in amounts to be determined under Rule 131(c), and the claims of the others are set down for retrial in accordance with the opinion. The case is remanded to the trial judge for further proceedings.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX C

June 17, 1892.

CHAP. 120.—An act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation.

Klamath River Reservation, Cal.

Opened to settlement.

Provisos.

Allotments to Indians.
Vol. 25, p. 388.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided*, Exemption of settled lands.

That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first

Indian villages.

Homestead entries.

in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further*, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Mineral lands.

Rights of settlers' heirs.

Disposal of proceeds.

Approved, June 17, 1892.

APPENDIX D

Public Law 85-420

AN ACT

To provide for the restoration to tribal ownership of all vacant and undisposed-of ceded lands on certain Indian reservations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

Reservation and State	Approximate Acreage
Klamath River, California	159.57
Coeur d'Alene, Idaho	12,877.65
Crow, Montana	10,260.95
Fort Peck, Montana	41,450.13
Spokane, Washington	5,451.00

Provided, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

SEC. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

SEC. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

Approved May 19, 1958.

APPENDIX E

33 Interior Dec. 205

CRICHTON *v.* SHELTON.

The Klamath River Indian reservation was not abolished by or under the provisions of the act of April 8, 1864, but was recognized by the act of June 17, 1892, as an existing reservation, and the Indians thereon were by said act recognized as constituting a tribe.

Timbered lands are not necessarily excepted from allotment to Indians, but may be so alloted provided they contain sufficient arable area to support an Indian family and are on the whole, considering their location and the habits and subsistence of the Indians, suitable for a home for the allottee.

Allotments to Indians on the Klamath River reservation, under the provisions of the act of June 17, 1892, were made to the Indians as a tribe, under section 1 of the general allotment act of February 8, 1887, and not under the provisions of section 4 of said act.

Under the act of February 8, 1887, reservation Indians are not required to settle, improve, or maintain residence upon their allotments made from lands held for the tribe.

An Indian woman, recognized as a member of the Klamath tribe, is not by reason of her marriage to a white man, deprived of her right to an allotment in the tribal lands; and the children of such woman are likewise entitled to such an allotment.

Acting Secretary Ryan to the Commissioner of the General Land Office,

(F. L. C.) *August 30, 1904* (C. J. G.)

An appeal has been filed by John L. Crichton from the decision of your office of December 19, 1903, holding intact Klamath River Indian allotments Nos. 108 and 109, made to Mary Shelton and her minor daughter, Mary Shelton, jr., respectively, for lot 7 and the SE, ¼ of SW. ¼, Sec. 33, the SW. ¼ of the SW. ¼, Sec. 33, and the SE. ¼ of the SE. ¼, Sec. 32, T. 13 N., R. 2 E., H. M., Eureka, California.

The allotments were made in August, 1893, under the act of June 17, 1892 (27 Stat. 52), and first or trust patents issued thereon September 26, 1893. Crichton filed charges against said allotments May 9, 1902, and amended affidavit January 19, 1903, for the purpose of suggesting the death in the meantime of Mary Shelton, sr. He alleged substantially that the allotments were illegally made for the reason that the lands were timber lands subject to sale under the act of June 3, 1878; that said lands were not disposed of in accordance with the provisions of the act of June 17, 1892; that the lands are not suitable for or adapted to agriculture or grazing, being rough and covered with a dense and heavy growth of redwood and pine timber; that the allottees never made settlement upon said lands or resided thereon, and have never improved or cultivated the same; that said allottees do not belong to any Indian tribe; and that they were the wife and daughter, respectively, of a white man.

Your office, after receiving the report of a special agent who had investigated the matter, ordered a hearing in the case, at which both parties appeared and submitted testimony. The local officers rendered divided opinions, the register finding that the allotments should remain intact and the receiver that they should be canceled. Your office, in the meantime having procured the opinion of the Commissioner of Indian Affairs in the premises, concurred in the finding of the register and denied Crichton's application for the cancellation of the allotments.

The chief contentions made by appellant are that under the provisions of the act of April 8, 1864 (13 Stat., 39, 40), the Klamath River Reservation was abolished and became subject to subdivision and sale; that the lands covered by these allotments are timber lands and therefore not subject to allotment; and that the allottees not being members of a tribe and the lands no longer being in reservation, the allotments, under the provisions of the act of June 17, 1892, *supra*, could only be made under section 4 of the act of February 8, 1887 (24 Stat., 388), and not under section 1 of said act.

The act of June 17, 1892, is as follows:

> That all of the lands embraced in what was Klamath River Reservation, in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws

of the United States and the Territories over the Indians, and for other purposes," and if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided*, That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands:

> *And provided further*, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Section 1 of the act of February 8, 1887, as amended by the act of February 28, 1891 (26 Stat., 794), is in part as follows:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot each Indian located thereon one-eighth of a section of land.

Section 4 of said act provides:

> That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local landoffice for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations, etc.

By act of March 3, 1853 (10 Stat., 226, 238), entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes," etc., it was provided:

> That the President of the United States, if upon examination he shall approve of the plan hereinafter provided for the protection of the Indians, be and he is hereby authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purpose: *Provided*, That such reservations shall not contain more than twenty-five thousand acres in each: *And provided further*, That said reservation shall not be made upon any lands inhabited by citizens of California, and the sum of two hundred and fifty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to defray the expense of subsisting the Indians to California and removing them to said reservations for protection: *Provided, further*, if the foregoing plan shall be adopted by the President, the three Indian agencies in California shall be thereupon abolished.

By act of March 3, 1855 (10 Stat., 686, 699), also an appropriation act of similar title to the above, it was provided:

> For collecting, removing, and subsisting the Indians of California, (as provided by law,) on two additional military reservations, to be selected as heretofore, and not to contain exceeding twenty-five thousand acres each, in or near the State of California the sum of one hundred and fifty thousand dollars: *Provided*, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for, and shall not

> expend the amount herein appropriated unless, in his opinion, the same shall be expedient; and the last proviso to the authority for five military reservations in California, per act of third of March, eighteen hundred and fifty-three, be, and the same is hereby, repealed.

By executive order of November 16, 1855 (Executive Orders relating to Indian Reserves, 1902, pp. 21, 22), in pursuance of the above legislation, a strip of territory commencing at the Pacific Ocean and extending one mile in width on each side of the Klamath River for a distance of twenty miles was set apart for Indian purposes. It was provided that upon a survey of the tract a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres authorized by law. This reservation has since been known and referred to as the Klamath River Indian Reservation in California. In the year 1861 nearly all the arable lands of said reservation and the improvements thereon were destroyed by a freshet, in view of which, upon recommendation of the Indian agent, a new and temporary reservation, known as Smith River Reserve, was established May 3, 1862, to which it was proposed to remove the Klamath Indians. The indorsement of the Secretary of the Interior on the recommendation of the Commissioner of Indian Affairs relating to Smith River Reserve was: "The lands embraced in the proposed reservation may be withdrawn from sale for the present." (Ex. Orders, p. 33.) It appears that only a small portion of said Indians removed to the new reservation, by far the greater number preferring to remain on the old; and nearly all of those who did remove returned within a few years to Klamath River.

By act of April 8, 1864 (13 Stat., 39, 40), the State of California was constituted on Indian superintendency, and the President was authorized in section 2 of the act, to set apart—

not exceeding four tracts of land, within the limits of said State, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said State, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: . . . . *And provided, further,* That said tracts to be set apart as aforesaid may, or may not,. as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said State, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

SEC. 3. *And be it further enacted,* That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe, etc.

AS TO THE STATUS OF THE KLAMATH RIVER RESERVATIONS

At the date of the act of April 8, 1864, there were in existence in California the following reservations: Klamath River, Mendocino and Smith River (Ex. Orders, pp. 21, 22 and 33). In addition, the Secretary of the Interior had directed that Nome Cult Valley, or Round Valley, be set apart and reserved for Indian purposes (Ex. Orders, p. 29, and House Doc. 33, 50th Cong., 1st Sess.). The Mendocino and Smith River reservations were discontinued by act of Congress of July 27, 1868 (15 Stat., 221, 223). There was never such an act with reference to Klamath reservation. Under date of August 21, 1864, State superintendent Wiley, acting under instructions, from the Department, notified settlers in Hoopa Valley not to make any further improvements upon their places, as he had located said valley as one of the four tracts authorized by the act of 1864, to be named the Hoopa Valley Reservation, the metes and bounds to be thereafter established subject to the approval of the President (Ex. Orders, p. 20). Notwithstanding there had been no executive orders setting apart the same, Congress recognized both the Round Valley and Hoopa Valley reservations by making appropriations for them as such (15 Stat., 221, and 16 Stat., 37). The President declared the exterior boundaries of the Hoopa Valley Indian Reservation June 23, 1876, and formally set apart the same for Indian purposes "as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864." (Ex. Orders, p. 20.) No order, executive or otherwise, appears to have issued setting apart or retaining the Round Valley reservation, under the act of 1864, as it was selected by the State superintendent in 1856 and established by order of the Secretary of the Interior in 1858 (Ex. Orders, p. 29, and House Ex. Doc., 33, 50th Cong., 1 Sess.). But by order of the President of March 30, 1870, said reservation was enlarged (Ex. Orders, p. 31). By act of March 3, 1873 (17 Stat., 633), the boundaries of said reservation were changed so as to add thereto thousands of acres, and by executive order of July 26, 1876, a tract of land was "withheld from public sale, and reserved for the use and occupancy of the Indians located on the Round Valley Reservation, as an extension thereof" (Ex. Orders, p. 33). By executive order of January 31, 1870, two tracts were set apart for the Mission Indians in California. This order was subsequently revoked and the lands restored to the public domain. But by order of December 27, 1875, the President set apart nine different non-contiguous tracts "as reservations for the permanent use and occupancy of the Missions Indians in Lower California." May 15, 1876, eight other tracts were in the same way ordered set apart as reservations for said Indians, in addition to those reserved under Executive order of December 27, 1875. Other orders were from time to time made adding to, taking away from and changing the lines of the tract already reserved, until no less than nineteen different and non-contiguous tracts were reserved for the Mission Indians, and all these constituted one of the four reservations authorized by the act of April 8, 1864 (Executive orders, pp. 23, 24, 25, 26, 27 and 28). The Tule River Reserve was set apart for Indian purposes by Executive Order of January 9, 1873, and by order of October 3, 1873, another tract, known as the "Tule River Indian Reservation," was set apart in lieu of that under the order of January 9, 1873; and by Executive order of August 3, 1878, a portion of the land described was taken out of reservation and restored to the public domain (Executive Orders, p. 34).

Under date of January 20, 1891, the Assistant Attorney General for this Department rendered an opinion upon certain questions propounded by the Commissioner of Indian Affairs, one of which was as to whether the Department was authorized to cause the removal of intruders from the Klamath River Indian Reservation in California. In the course of said opinion, after referring to the above orders withdrawing lands for Indian purposes, it was said:

> The foregoing matters are all contained in the reports of the officers of the Indian Office, annually communicated to and therefore within the knowledge of and it is to be presumed approved by Congress when the annual appropriations were subsequently and continuously made for these four reservations of Hoopa Valley, Round Valley, The Mission and Tule River.
>
> It is therefore fair to adopt this approval, by Congress, of the action of the officers, in the premises, as a legislative construction of the act of 1864. Three conclusions inevitably flow from such construction: 1, that no formal order of the President retaining an existing reservation was deemed necessary, but its actual retention by the officers of the Indian Bureau was sufficient to constitute it one of the four authorized reservations; 2, that contiguity was not an essential, but a reservation might be composed of several non-contiguous parcels of land; and 3, that the Executive authority, in that respect, was not exhausted when once exercised in the setting apart of "four tracts" or parcels of land, as reservations; but that discretion continued, and yet exists, to change, add to, diminish or abolish reservations and establish others, as may seem most promotive of the public interests.
>
> In relation to the Klamath River reservation, as in that of the Round Valley, no formal or written order appears to have been issued for its retention. In both of these instances the Indian Office retained possession and control of the former reservation, making no change in their condition, status or man-

> agement, further than that they passed under the control of the one State superintendent as required by the act of 1864. The Indians remained in the occupation of both of these reservations, and yet so occupy them alone, except so far as that occupation may have been intruded upon by individual white men, under color of claims. Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on Klamath, and for the all-sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect.

As showing further the status of the Klamath River reservation and the Indians thereon the following references are made:

> The permanent settlement of the Indians residing upon said reservation, and the disposal of so much of the reservation as may not be needed for that purpose, are matters engaging the attention of the Department at this time. What the final result may be I am unable to say. The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority (Comr. Ind. Afs. to D. B. Hume, July 23, 1883—Ex. Doc., 140, p. 11).
>
> The appeal raises the question of fact, namely, whether the said reservation, which was created by Executive order of November 16, 1855, has been regarded as a reservation since passage of the act of April 8, 1864 (13 Stat., 39), which limited the Indian reservations in California to four. It is sufficient for me to say that it has been so regarded, and that various allotments within its limits have recently been made. In my letter of March 26, 1883, to the Commissioner of Indian Affairs, I stated that when the selections within said reservation were all made, I would consider the question of restoring the re-

mainder of the lands to the public domain (John McCarthy, 2 L. D., 460).

Now it appears that in carrying out the provisions of the act of April 8, 1864, the Hoopa Valley Reservation was established (Pamphlet, Ex. Orders, p. 301), the Round Valley already in existence was retained, and it was the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained, to extend the Hoopa Valley Reservation so as to include the Klamath River Reservation, or else keep it up as a separate reservation, and have a "station" or sub-agency there, to be under the control of the agent at the Hoopa Valley Reservation.

* * * *

The Klamath River Reservation has certainly been regarded by this Department as in a state of Indian reservation.

* * * *

I do not find that any steps were ever taken to sell the Klamath Reservation as an abandoned reservation, under section 3 of the act of April 8, 1864, nor that the General Land Office was ever formally advised of the relinquishment of the same. The reservation appears to have been kept intact with a view to holding it for the continued use of the Indians, who it appears never did wholly abandon it.

In 1879, in compliance with the wishes of this office, all trespassers known to be on the reservation were removed by the military under the direction of the War Department.

In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the reservation, and the Indians were accordingly requested to make individual selections, but the work had to be suspended on account of the discovery of gross errors in the public surveys.

> All this tends to show that the Department has regarded the lands as being in a state of reservation, and I may add that for a number of years the agent at the Hoopa Valley Agency has been required to exercise supervision over the affairs of the reservation (Comr. Ind. Affrs. to Sec'y Int., April 4, 1888).
>
> By the second section of the act of April 8, 1864 (13 Stat., 39), it is provided thta the Persident, at his discretion, shall set apart not exceeding four tracts of land within the State of California to be retained by the United States for the purposes of Indian reservations, and that said tracts may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said State.
>
> The third section of that act provides "that the several Indian reservations in California whch shall not be retained for the purposes of Indian reservations" shall be surveyed and offered for sale as therein directed. Indians have continued to reside on the Klamath River lands, and those lands have been and are treated as in state of reservation for Indian purposes, the jurisdiction is under the United States Indian agent for the Hoopa Valley Agency (An. Rept. Sec'y Int., 1888).

The following is a resolution of the Senate dated February 13, 1889:

> *Resolved,* That the Secretary of the Interior be, and he hereby is, directed to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian Reservation in the State of California, in pursuance of the provisions of the act approved April 8, 1864, entitled "An act to provide for the better organization of Indian affairs in California."

In response to this resolution the Commissioner of Indian Affairs addressed a letter to the Secretary of the Interior, dated February 18, 1889, in part as follows:

> In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this (Ex. Doc. 140, pp. 1, 2).

In the opinion of the Assistant Attorney General for this Department hereinbefore referred to, it was said:

> These facts show that the reservation in question has never been relinquished by formal act of the Indian Office, and no steps whatever have been taken looking to its release from Indian reservation and occupancy, and its survey, appraisement and sale under the act of 1864. On the contrary, it appears that it was always the purpose of the Indian Office to retain it as a reservation. . . .
>
> Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the

> proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administartion of the public land system. . . . It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so?
>
> * * * *
>
> In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intension of that body to deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable.

It was therefore concluded that the Klamath River reservation might be legally considered a part of the Hoopa Valley reservation, one of the four Indian reservations authorized by the act of 1864, and consequently that the Department was clothed with authority to remove intruders therefrom, and that the Hoopa Valley reservation may be legally extended so as to cover the ground of the Klamath reservation.

From the foregoing it will be seen that the question raised by the appeal as to the status of the Klamath River Reservation in California is not a new one. Such reservation has all along been regarded and treated as retained for Indian purposes, and the Department has so held. The only Indians even remotely recognized as nonreservation Indians were those residing along the Klamath River between the boundaries of the Hoopa Valley and Klamath River reservations. In the case of Spalding *v.* Chandler (160 U.S., 394, 403-404) it is said:

> It is not necessary to determine how the reservation of the particular tract, subsequently known as the "Indian reserve," came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. . . . But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract, afterwards known as the Indian reserve, was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. . . . . If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

In the case of Minnesota *v.* Hitchcock (185 U.S., 373, 389-90), it was held:

> Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is

> enough that from what has been done there results a certain defined tract appropriated to certain purposes.

And in the case of State of Minnesota (22 L. D., 388), it was said:

> It is not necessary in order to constitute a reservation that a treaty, or act of Congress, shall specifically mention the lands that are reserved, but it is sufficient if the lands occupied by the Indians are recognized by the officials of the government as reserved Indian lands.

The fact is that by Executive order of October 16, 1891 (Executive Orders 1902, p. 20), the Hoopa Valley Reservation was made to include the Klamath River Reservation, as follows:

> It is hereby ordered that the limits of the Hoopa Valley Reservation, in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in said State by act of Congress approved April 8, 1864 (13 Stat., 39), be, and the same are hereby, extended so as to include a tract of country 1 mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean: *Provided, however*, That any tract or tracts included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

This then was the status of the Klamath reservation upon the passage of the act of June 17, 1892, *supra*. Previously thereto numerous bills had been introduced in Congress providing for the disposition and sale of lands within said reservation. In his annual report for 1885 the Commissioner of Indian Affairs said:

> No less than three bills were introduced in the last Congress "to restore the reservation to the public domain," in each of which provision was made for allotting lands in severalty to the Indians (S. 813 and H.R. 112 and 7505). Neither of said bills was enacted, for the reason, it is presumed, that they were not reached in the regular course of business before adjournment. It is my intention to ask at an early day for legislation suitable to the wants of these Indians.

In the committee reports upon House bills Nos. 113, Report 1176, 51 Cong., 1 Sess., and 38, Report 161, 52 Cong., 1 Sess., it was stated that as the Klamath River Reservation was not included within the limits of either of the four reservations authorized by the act of 1864, it became abandoned under the provisions of said act. It was further stated:

> As this land does not constitute an Indian reservation, and has not been used as such for twenty-eight years, there does not appear to be any reasonable objection to the passage of the present bill, the only object and effect of which will be to prescribe a mode for its disposition and sale different from that fixed by act of April 8, 1864 (House Rept. 161, 52 Cong., 1 Sess.).

In view of what is set forth herein the committee was apparently mistaken in concluding hat the Klamath had not been used as an Indian reservation. However, none of the bills became law except that of June 17, 1892, which can be construed in no other light than a distinct recognition of the Indians' rights on said reservation. Both the reports of the committee and the act of 1892 preclude the idea that the lands within said reservation should have been disposed of under the provisions of the act of 1864, a different mode for their disposition being prescribed in the bill that became law as well as in the bill that did not.

In support of the appeal here reference is made to the case of United States *v.* Forty-Eight Pounds of Rising Star Tea (35 Fed. Rep. 403), decided in the United States district court of California, and also to the same case decided in the United States circuit court for the same State (38 Fed. Rep., 400). The first case was elaborately discussed by the Assistant Attorney General for this Department in his opinion of January 20, 1891, hereinbefore referred to, with the result that while conceding the probable correctness of the judgment rendered in said case, the Assistant Attorney General was not convinced that his own views were erroneous, and he could not assent to the reasoning of the court. That case arose upon a libel filed by the United States against certain packages of goods belonging to one R. D. Hume, seized because of an alleged violation of Sec. 2133 of the Revised Statutes, which provides:

> Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all his merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of five hundred dollars.

The violation of law in this instance consisted in paying the Indians "in trade" for their services in fishing, by furnishing them with articles composing the cargo of a vessel owned by Hume, in the Klamath River, a navigable stream under the laws of the State of California. The court incidentally held that the Klamath River reservation was an abandoned reservation, to be disposed of as specifically provided in the act of 1864: that the Klamath lands are not such a reservation as brings them within the meaning of the terms "Indian country." The Assistant Attorney General held "there was and could be no question properly before the courts as to the legal or actual status of that reservation; and the utterances of the Judge in relation thereto were *dicta* and not essential to the decision of the case before the court." The date of decision by the district court was June 7, 1888, which was the one discussed by the Assistant Attorney General, and that of the circuit court April 1, 1889. The case again has been considered in connection with the concurring decision therein on appeal to the circuit court. The Department is unable to find that it has any controlling bearing upon the case now under consideration. Besides, whatever persuasive force said cases may have had prior thereto, is minimized or destroyed by reason of the Executive order of October 16, 1891, extending the Hoopa Valley Reservation so as to include the Klamath, and the act of June 17, 1892, which specifically provides for a different mode of disposition for the lands in the latter reservation from that prescribed in the act of 1864.

AS TO THE CHARACTER OF THE LANDS IN THE KLAMATH RIVER RESERVATION

The directions given to the State superintendent August 15, 1855, were to select the reservation from such "tracts of land adapted as to soil, climate, water privileges, and timber, to the comfortable and permanent accommodation of the Indians."

> The land on this river is peculiarly adapted to the growth of vegetables, as it is expected that potatoes and other vegetable food, which can be produced in any abundance, together with the salmon and other fish which abound plentifully in the Klamath river, shall constitute the principal food for these Indians (An. Rept. Comr. Ind. Affs. 1856, p. 238).

> One great difficulty this reservation labors under is the small amount of land that can be brought under cultivation. The Klamath river runs through a canyon the entire length, and the reservation located upon each side of it, the only land suitable for

> cultivation is in the bottoms, ranging in size from one acre to seventy. . . . With these exceptions, the balance consists of mountains heavily timbered, through which the river appears to have cleft its way, interspersed with bottoms of from one to three acres (Id. 1585, p. 286).
>
> This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians (Id. 1861, p. 147).
>
> The Klamath river, from the mouth of the Salmon river down, runs mostly through a canon, and is a very broken country, and had my predecessor allowed the Indians to care for themselves at the time of the great overflow, they would have taken to the mountains, and in a few days after the flood had subsided they would have returned to the river banks, and with fish have provided for their immediate wants, (as in fact two-thirds of them did and yet remain there), and would saved the government the heavy expense of their removal and subsistence at Smith's river. The great number of Indians inhabiting the Klamath and Humboldt countries, the dense redwood forests on the river bottoms, and the high, craggy, precipitous mountains back, would, to my mind, be a serious warning against any effort to remove them by military force, etc. (Id. 1864, p. 122).

The country along the Klamath river, especially where the non-reservation Indians were located, and the habits and homes of the people, are thus described in the report of a special agent under date of June 25, 1885 (An. Rept. Cmr. Ind. Affs. 1885, p. 264):

> Nature seems to have done her best here to fashion a perfect paradise for these Indians, and to repel

the approach of the white man. She filled the mouth of the Klamath River with a sand-bar and huge rocks, rendering ordinary navigation impossible, and pitched the mountains on either side into such steeps and amazing confusion that the river has a hard struggle to drive its way through the wonderful gorges; it turns and twists and tumbles along the rocks and gulches in an incessant mad rush to the ocean, without one moment's rest and without touching the borders of one acre of meadow land. The banks and hills shoot up abruptly from the river in jaunty irregularity, as it formed solely for the capricious life and limited aspirations of the Indians. Tremendous bowlders and cragged points jut into the river and change its course, forming innumerable eddies and back currents, where salmon seek rest, to be taken in large numbers by means of Indian nets. . . . .

This, then, is where these Indians dwell in their grotesque villages. They form a very respectable peasantry, supporting themselves without aid from the Government by fishing, hunting, raising a little stock, cultivating patches of soil, and by day's labor at the Arcata lumber-mills. There is a crude thrift among them that one can not help admiring. Their little villages are perched on the mountain side, with most picturesque attractiveness, their houses are all made of lumber, and look as if they had been tossed upon the hillsides and allowed to stand wherever they gained a foothold. The beauty of irregularity could have no finer effect with studied art or the taste of cultivated refinement. Often a latticed porch, a curtained window, or a high roof with overhanging eaves displays an attempt at civilization, crude as it may be . . . .

The old men keep the nets in order and fish steadily; the women dress and dry fish, gather acorns for meal, and fetch wood and water; middle-aged men go off to work awhile, look after the hogs and horses, and make gardens, with their wives to help them. It is common to find little gardens of potatoes, beans, and corn among them, fenced in, just out of town as it were. . . . . Indians have had general and actual, though unrecorded, possession and occupation of the whole river line here for years and years. Their dwellings are scattered and permanent. They wish to remain here; here they are self-supporting—actually self-sustaining. This is their old home, and home is very dear to them—treasured above everything else. No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man.

* * * *

The few among these Indians who have turned their attention to farming show much thrift and enterprise. Though, owing to the fact that but a small portion of their territory is suitable for farming, a large majority of them depend upon wages for a living (Id. 1892, p. 230).

The only arable land occupied by Indians is found on the benches along the river in lots of a few acres in extent. These are generally cultivated as gardens. . . . . The land allotted can never be used for agriculture, but the allotment secures the Indians in the tenure of their homes. (Id. 1894, p. 117.)

If it should be thought wise to allot land in severalty to Indians in such a stage of civilization, still this tract is of a character which ought not to be devoted to such a purpose. It would be entirely useless to them, being alone valuable for lumbering, for mining, and stock raising—by far the greater part being heavily timbered, mountainous, and broken, as shown by the field notes of survey of said land

> House Rept. 1176. 54 Cong., 1 Sess., April 1, 1890 and Id. 161, 52 Cong., 1 Sess., February 5, 1892).

The above extracts require very litle comment. They perhaps show that a comparatively small portion of the lands within the Klamath Indian reservation is suitable for agricultural purposes, strictly speaking, and that said lands might fairly be classed as timber lands. But it is equally clear that the lands within this reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath river. At the same time there is undoubtedly sufficient arable lands for garden and grazing purposes, and at some points on the river there are large quantities of farming lands. In the Instructions of February 21, 1903 (32 L. D., 17), it is said:

> The practice of forbidding allotments under section 4 of the general allotment act, of lands valuable for the timber thereon, is not based upon any decision of the Department laying down a well defined rule, and there is no good reason for such prohibition provided the allotment contains sufficient arable land to support an Indian family and is on the whole suitable for a home for the allottee and is applied for in good faith for that purpose.

This is certainly true of allotments of reservation lands under the act of 1887, and particularly so where allotments are authorized of specified tracts under special acts. But what is of more importance, the above extracts clearly show that Congress was fully aware of the status and character of these lands, the history of the Indians and their occupancy of said lands, at the date of the passage of the act of June 17, 1892. The act of June 17, 1892, provides, among other things:

> That any portion of said land more valuable for its mineral deposits than for agricultural purposes,

> or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands.

The whole history of these Indians, the recommendations of the Indian Office, and the context of the act itself, show that the primary purpose of the legislation of 1892 was to preserve the rights of the Indians located on the Klamath reservation. Allotments were to be made to all applicants who should make their selections within one year. Even lands settled upon, improved, and occupied by settlers were not exempt from allotment if the same had been resided upon by one or more Indians for four months prior to the passage of the act. After the expiration of one year, if any person had settled upon a tract not allotted to or reserved for the Indians, he could enter it under the homestead law upon payment of a certain price therefor. But, under the proviso above quoted, the lands not allotted or reserved were to be entered under the laws usually applicable to their particular character.

AS TO THE TRIBAL STATUS OF THE KLAMATH RIVER INDIANS

It may be stated generally that these Indians have always been recognized as a tribe by the government. Any effort to show that they are not a tribe must combat the reports of the government's agents, the correspondence between the Department and the Indian Office, the orders of the Executive and the appropriation acts of Congress wherein such recognition unmistakably appears. The preponderance of the evidence introduced at the hearing in this case is to the effect that the Klamaths constitute a tribe. Members of the tribe by blood. as well as white men who have intermarried with these Indians and who are familiar with their habits, customs and government, from long residence among them testify that they are a distinct tribe, that theyspeak, a different language from the neighboring Indians, have laws of their own; that there are men among them who are recognized as leaders or chiefs—the present chief being Peckwanish Colonel or Suregoin Jim—and that the members of this tribe are called "Polyacks." The records of the Indian Office show that on October 6, 1851, a treaty was made as follows:

> A treaty of peace and friendship made and concluded at Camp Klamath, at the junction of the Klamath and Trinity rivers, between Redick McKee, one of the Indian Agents, specially appointed to make Treaties, with the various Indian Tribes in California, on the part of the United States, and the Chiefs, Captains, and Headmen of the Tribes or bands of Indians, now in council at this camp, representing the "Poh-lik," or lower "Klamath," The "Peh-tuck," or upper Klamath, and the "Hoo-pah" or Trinity river Indians—containing also stipulations, preliminary to future measures, to be recommended for adoption on the part of the United States.

The treaty provided for a cession, and the setting apart of a described tract 20 miles in length by 12 in width—"containing in all six or seven square miles of farming land"—as an Indian reservation for the tribes named and such other tribes as the United States might thereafter remove from other parts of the valleys of the Trinity and Klamath rivers, or the country adjacent. The treaty appears never to have been ratified or confirmed, but it effectively shows that the Indians had the capacity of making treaties; that they had a tribal organization capable of entering into a treaty with the United States. Being self-supporting and independent as they were, it may be their tribal relations were not so intimate and pronounced as other tribes who were dependent upon the government. But they were nevertheless looked after by agents of the government and were always regarded and treated as a tribe. Congress in the act of June 17, 1892, in effect recognized these Indians as a tribe, as well as their claims to the lands in the

Klamath reservation, by providing that the proceeds arising from the sale of the remaining lands after allotments were made, should constitute a fund to be used for the maintenance and education of the indians and their children.

In view of the provisions of the act of June 17, 1892, the above matters are given at length as a subject of historical interest and not because they are regarded as of necessarily controlling importance in determining the questions involved in this case. The act of 1892 was a special act authorizing allotments of specific lands, which alone precluded the idea that Congress intended they should be allotted under the fourth section of the act of 1887. The act of 1892 provided for allotment to "any Indian now located upon said reservation," which removes any question as to whether the lands constituted a reservation, or whether the Indian was a member of a recognized tribe or not. The question of tribal relation becomes of importance only in connection with that portion of the act of 1892 which provides that the allotments therein authorized are to be made to the Indians "under the provisions of the act of February eighth, eighteenth hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof." The act did not provide under which section of the act of 1887 the allotments should be made, but as said act of 1892 in terms recognized the Klamath as a reservation, there ought to be little or no question that it was contemplated that they should be made under the first section of the act of 1887, as the fourth section of said act refers exclusively to Indians not on reservations. Prior to the passage of the act of 1892 the Department had already held that the lands within the Klamath

River reservation "should be allotted, if allotment be made, to the Indians thereon, under the first section of the allotment act of February 8, 1887 (Opinion Asst. Atty. Gen'l, January 20, 1891). The wording of the act of 1892 is "any Indian now located upon said reservation." It does not have to be shown under this act that the Indian was a member of a tribe or band, and this shows that all the provisions of the act of 1887 are not applicable, but rather the manner therein prescribed for making allotments. Whatever may have been the status of the lands or the Indians the act of 1892 took them out of the class subject to allotment under the fourth section of the act of 1887. The lands within the Klamath have never been such as could be regarded as "not otherwise appropriated."

At the time the allotments in question were made the husband of Mary Shelton, sr., William Shelton, a white man, was dead, and her daughter, Mary Shelton, jr., was about twelve years of age. The widow was then living with her son-in-law on a tract of land adjoining the present allotments, which tract had been allotted to the latter's daughter. The Sheltons have always been claimed by the Indians as members of the tribe. It seemed to be conceded that the country along the Klamath river is all of the same general character. The lands allotted the Sheltons are similar in all respects to many allotments where the Indians actually live and maintain their families. The fishing privileges are considered by the Indians as of more value in making a living than agricultural pursuits. They also utilize nuts, acorns and berries for food. The evidence tends to show that at time of these allotments there were no lands open more valuable for the purpose of making homes—all of the open lands having been allotted or settled upon by the whites. It appears that there are some good farm lands within six or eight miles of the ocean, but it also appears that the alloting agent commenced at the mouth of the river and worked up. So that when these allottees were reached all the so-called open lands were already claimed by other Indians, the result being that many Indians had to take small pieces. Now, as herein shown, all these conditions were well known to Congress at date of passage of the act of June 17, 1892. That act provided for allotments to Indians located on the reservation. In the view suggested by the appeal here the act of 1892 would have been wholly inoperative at its passage for one reason alone, that is, that the lands to be allotted were timber lands. Being aware of this condition it must be assumed that Congress would not do a vain act, that is, would provide only for the allotment of agricultural lands knowing full well that the lands specified for allotment were not of that character.

Under the general allotment act of 1887 reservation Indians are not required to settle, improve, or maintain residence upon their allotments made from lands held for the tribe, so that it is unnecessary to consider the evidence bearing on those points in this case. Being a recognized member of the tribe, Mary Shelton, sr., was entitled to share in the tribal property regardless of her marriage to a white man. Her status in this respect was not affected by the act of August 9, 1888 (25 Stat., 392), or the act of June 17, 1892. Her daughter, Mary Shelton, jr., would also have been entitled to an allotment under the act of 1887, and her rights are preserved by the act of June 7, 1897 (30 Stat., 62, 90), which likewise was not affected by said act of 1892.

A supplemental brief has been filed here by appellant upon the scope of the act of April 23, 1904 (33 Stat., 297), with particular reference to the bearing of said act upon the authority of the Secretary of the Interior to cancel first or trust patents issued for Indian allotments. In view of the conclusion reached herein it will be unnecessary to discuss in this connection the question thus raised.

The decision of your office holding these allotments intact, is hereby affirmed.

APPENDIX F

ACTS, TREATIES AND EXECUTIVE ORDERS OF SOME INDIAN RESERVATIONS WITH ORGANIC LANGUAGE SIMILAR TO THAT OF THE HOOPA VALLEY RESERVATION

Part 1 Reservations Created For A Class Of Beneficiaries Which Is Open-Ended.

1. ANNETTE ISLAND RESERVE. Act of March 3, 1891 § 16, 26 Stat. 1095, 1101, "for the use of the Metlakatla Indians, and those people known as Metlakatlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them."

2. BLACKFEET RESERVATION. Act of April 15, 1874, 18 Stat. 28, I *Kappler* 149*, "for the use and occupation of the . . . Blackfoot . . . and such other Indians as the President may, from time to time, see fit to locate thereon." Act of May 1, 1888, 25 Stat. 113 (Article IX), I *Kappler* 261, 265-66, "for the Indians now attached to and drawing rations at the Blackfeet Agency."

3. CHEYENNE RIVER RESERVATION. Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein, named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they maybe willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, § 4, 25 Stat. 888, I *Kappler* 328, 329, "for the Indians receiving rations and annuities at the Cheyenne River Agency."

4. COLVILLE RESERVATION. Executive Order of July 2, 1872, I *Kappler* 916, "for said Indians [Methow, Okano-

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* Citations to Kappler refer to C. Kappler, *Indian Affairs, Laws and Treaties* (2d Ed. U.S. Govt. Print. Off. 1904, as supplemented).

gan, San Poel, Lake, Colville, Calispel, Spokane, Coeur d'Alene and scattered bands, not parties to any treaty], and for such other Indians as the Department of the Interior may see fit to locate thereon."

5. CROW CREEK RESERVATION. Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, § 6, 25 Stat. 888, I *Kappler* 328, 329, "for the Indians receiving rations and annuities at the Crow Creek Agency."

6. DUCK VALLEY RESERVATION. Executive Order of May 4, 1886, I *Kappler* 866, "for the use and occupation of the Paddy Caps band of Pi-Utes and such other Indians as the Secretary of the Interior may see fit to settle thereon."

7. DUCKWATER RESERVATION. Proclamation of November 13, 1940, VII *Kappler* 1436, "for the use and benefit of such Shoshone Indians of the Duckwater Valley in Nevada, and such other Shoshone Indians . . ., as may be designated by the Secretary of the Interior."

8. ELKO COLONY. Executive Order No. 2824 March 23, 1918, IV *Kappler* 1028, "for the use of certain Shoshone and Paiute Indians now residing near the town of Elko, Nevada, and such other Indians as the Secretary of the Interior may place thereon."

9. FLATHEAD RESERVATION. Treaty of July 16, 1855, 12 Stat. 975 (Article 2), II *Kappler* 722, 722-23 "for the use and occupation of the said confederated tribes [the Flathead, Kootenay, and Upper Pend d'Oreilles Indians], and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consoli-

dated with the tribes parties to this Treaty, under the common designation of the Flathead Nation." *See* also Act of April 23, 1904, 33 Stat. 302 § 2, III *Kappler* 79, allotments "to all persons having tribal rights with said Confederated Tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the lower Pend d'Oreille or Kalispel Indians now on the Reservation."

10. FOND DU LAC RESERVATION. Executive Order No. 2144 March 4, 1915, IV *Kappler* 1023, "for the use and occupancy of a band of Chippewa Indians, now living thereon, and for such other Indians as the Secretary of the Interior may see fit to settle thereon."

11. FORT BELKNAP RESERVATION. Act of April 15, 1874, 18 Stat. 28, I *Kappler* 149, "for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate thereon." Act of May 1, 1888, 25 Stat. 113 (Article IX), I *Kappler* 261, 264, "for the Indians now attached to and receiving rations at the Fort Belknap Agency, Montana."

12. FORT MCDOWELL RESERVATION. Executive Order of September 15, 1903, III *Kappler* 667, "for the use and occupancy of such Mojave-Apache Indians as are now living thereon or in the vicinity and such other Indians as the Secretary of the Interior may hereafter deem necessary to place thereon."

13. FORT PECK RESERVATION. Act of April 15, 1874, 18 Stat. 28, I *Kappler* 149-50, "for the use and occupation of the Gros Ventre Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate thereon." Act of May 1, 1888, 25 Stat. 113 (Article IX), I *Kappler* 261, 264, "for the Indians now attached to and receiving rations at the Fort Peck Agency."

14. FORT YUMA RESERVATION. Executive Order of January 9, 1884, I *Kappler* 832, "for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon."

15. GILA RIVER RESERVATION. Executive Order No. 1426, October 23, 1911, III *Kappler* 668, "for the use of the Pima and Maricopa Indians and such other Indians as the Secretary of the Interior may see fit to settle thereon."

16. GOSHUTE RESERATION. Executive Order of March 23, 1914, IV *Kappler* 1048, "for the use and benefit of the Goshute and other Indians on the public domain in the State of Utah."

17. HOPI RESERVATION. Executive Order of December 16, 1882, I *Kappler* 805, "for the use and occupancy of the Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon."

18. KAIBAB RESERVATION. Executive Order of July 17, 1917, IV *Kappler* 1003, "for the use of the Kaibob and other Indians now residing thereon, and for such other Indians as the Secretary of the Interior may locate thereon."

19. LAGUNA PUEBLO. Executive Order of March 21, 1917, IV *Kappler* 1029, "for the use and occupancy of the Indians of the Laguna Pueblo, and such other Pueblo Indians as the Secretary of the Interior may settle thereon."

20. LOWER BRULE RESERVATION. Treaty of April 29, 1868, 15 Stat. 635 (Article 2), II *Kappler* 998, "for the absolute and undisturbed use and occupation of the Indians herein named, [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettler, Sans Arcs and Santee and Arapaho] and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889,

§ 5, 25 Stat. 888, I *Kappler* 328, 329, "for the Indians receiving rations and annuities at the Lower Brule Agency."

21. Makah Reservation. Executive Order of October 21, 1873, I *Kappler* 918, "for the use of said Makah and other tribes of Indians."

22. Mescalero Reservation. Executive Order of March 24, 1883, I *Kappler*, 872-73, "for the use of the said Mescalero Apaches and such other Indians as the Secretary of the Interior may see fit to locate thereon."

23. Moapa River Reservation. Executive Order of February 12, 1874, I *Kappler* 867, "for the use of the Pah-Ute and such other Indians as the Department may see fit to locate thereon."

24. Muckleshoot Reservation. Executive Order of April 9, 1874, I *Kappler* 918-19, "for the exclusive use of the Indians in that locality." Executive Order of January 20, 1857, I *Kappler* 920, "for the Nisqually, Puyallup, and other bands of Indians in Washington Territory."

25. Navajo Reservation. Executive Orders of May 17, 1884 and November 19, 1892, I *Kappler* 876-77, "for Indian purposes." Executive Order of January 15, 1917, IV *Kappler* 1030, "for the use and occupancy of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon." Executive Order of April 13, 1927, IV *Kappler* 1050, "for Indian purposes." Executive Order No. 1359, May 14, 1911, III *Kappler* 686, "for Indian purposes."

26. Nez Perce Reservation. Treaty of June 11, 1855, 12 Stat. 957 (Article 2), II *Kappler* 702, "for the use and occupation of the said tribe, and as a general reservation for other friendly tribes and bands of Indians in Washington Territory, not to exceed the present numbers of the Spokane, Walla-Walla, Cayuse, and Uma-

tilla tribes and bands of Indians." Treaty of August 13, 1868, 15 Stat. 693, II *Kappler* 1024, allowing "such Indians now residing outside the reservation as may be decided upon by the agent of the tribe and the Indians themselves, shall be removed to and located upon allotments within the reservation."

27. NISQUALLY RESERVATION. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (Articles 2 and 6), II *Kappler* 661, 662-63, "for the present use and occupation of the said tribes and bands [Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands]." "The President may . . . remove (the said Indians) from the reservations . . . or may consolidate them with other friendly tribes or bands. And he may further . . . cause the whole or any portion of the lands hereby reserved, . . . to be surveyed into lots, and assign them to such . . . as are willing to avail themselves of the privilege, and will locate on the same as a permanent home." Executive Order of Jan. 20, 1857, I *Kappler* 920, "for the Nisqually, Puyallup, and other bands of Indians in Washington Territory."

28. NORTHERN CHEYENNE RESERVATION. Executive Order of November 26, 1884, "for the use and occupation of the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory, and such other Indians as the Secretary of the Interior may see fit to locate thereon.", and Executive Order of March 19, 1900, I *Kappler* 860-61, "for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation."

29. PAPAGO RESERVATION. Executive Order of July 1, 1874, I *Kappler* 805, "for the use of the Papago and such other Indians as it may be desirable to place thereon." Executive Order of December 12, 1882, I *Kappler* 804, "for the use and occupancy of the Papago and other Indians now settled there, and such other Indians as the Secretary of the Interior may see fit to settle thereon."

30. **PINE RIDGE RESERVATION.** Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, 25 Stat. 888, § 1, I *Kappler* 328, for the Indians receiving rations and annuities at the Pine Ridge Agency."

31. **PUYALLUP RESERVATION.** Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (Articles 2 and 6), II *Kappler* 661, 662-63, "for the present use and occupation of the said tribes and bands [Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peck-sin, Squi-aitl, and sa-heh-wamish tribes and bands]." "The President may . . . remove (the said Indians) from the reservations . . . or may consolidate them with other friendly tribes or bands. And he may further . . . cause the whole or any portion of the lands hereby reserved, . . . to be surveyed into lots, and assign them to such . . . as are willing to avail themselves of the privilege, and will locate on the same as a permanent home." Executive Order of Jan. 20, 1857, I *Kappler* 920, "for the Nisqually, Puyallup, and other bands of Indians in Washington Territory."

32. **PYRAMID LAKE RESERVATION.** Executive Order of March 23, 1874, I *Kappler* 869, "set apart for the Pah-Ute and other Indians residing thereon."

33. **QUINAULT RESERVATION.** Treaty of July 1, 1855, and January 25, 1856, 12 Stat. 971, II *Kappler* 719, "for the present use and occupation of the said tribes and bands [the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians] . . . The President may . . . remove (the said Indians) from the reservations . . . or may consolidate them with other friendly tribes or bands. And he may further . . . cause the whole or any portion

of the lands hereby reserved, . . . to be surveyed into lots, and assign them to such . . . as are willing to avail themselves of the privilege, and will locate on the same as a permanent home." Executive Order of November 4, 1873, I *Kappler* 923, "for use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast."

34. ROCKY BOY'S RESERVATION. Act of September 7, 1916, 39 Stat. 739, IV *Kappler* 95, 96, "for Rocky Boy's Band of Chippewas and such other homeless Indians in the State of Montana as the Secretary of the Interior may see fit to locate thereon."

35. ROSEBUD RESERVATION. Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, 25 Stat. 888, § 2, I *Kappler* 328, "for the Indians receiving rations and annuities at the Rosebud Agency."

36. SALT RIVER RESERVATION. Executive Order No. 1322, March 22, 1911, III *Kappler* 671, "for the use of the Pima and Maricopa Indians and such other Indians as the Secretary of the Interior may see fit to settle thereon." Executive Order No. 1416, September 28, 1911, III *Kappler* 671, "for the use of the Pima and Maricopa Indians and such other Indians as the Secretary of the Interior may see fit to settle thereon."

37. SKOKOMISH RESERVATION. Treaty of Point No Point, January 26, 1855, 12 Stat. 933, II *Kappler* 674, "for the present use and occupation of the said tribes and bands [different villages of the S'Klallams, Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes] . . . It is, however, understood that should the President of the United States hereafter see fit to place upon the said

reservation any other friendly tribe or band . . . he shall be at liberty to do so." Executive Order of February 25, 1874, I *Kappler* 924, "for the use of the S'Klallam Indians."

38. SKULL VALLEY RESERVATION. Executive Order of September 7, 1917 and Executive Order of February 15, 1918, IV *Kappler* 1049, "for the use of certain Skull Valley Indians now residing thereon and such other Indians as the Secretary of the Interior may place thereon."

39. SUMMIT LAKE RESERVATION. Executive Order No. 1681, January 14, 1913, III *Kappler* 684, "for Paiute and Shoshoni Indians, and such other Indians as the Secretary of the Interior may settle thereon."

40. TULE RIVER RESERVATION. Executive Order of October 3, 1873, I *Kappler* 831, "for the Tule River, King's River, Owen's River, Manche Cajon and other scattered bands of Indians in the State of California."

41. TURTLE MOUNTAIN RESERVATION. Executive Order of December 21, 1882, I *Kappler* 885, "for the use and occupancy of the Turtle Mountain band of Chippewas and such other Indians of the Chippewa Tribe as the Secretary of the Interior may see fit to settle thereon."

Part 2 Reservations Created For Tribes Some of Whom No Longer Exist As Organized, Federally-Recognized Entities **

42. CHEYENNE RIVER RESERVATION (see also No. 3). Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho] and for such

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** Indian tribal entities recognized as having a government-to-government relationship with the United States are listed at 46 Fed. Reg. 35360 (July 8, 1981).

other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, § 4, 25 Stat. 888, I *Kappler* 328, 329, "for the Indians receiving rations and annuities at the Cheyenne River Agency."

43. COLVILLE RESERVATION (see also No. 4). Executive Order of July 2, 1872, I *Kappler* 916, "for said Indians [Methow, Okanogan, San Poel, Lake, Colville, Calispel, Spokane, Coeur d'Alene and scattered bands, not parties to any treaty], and for such other Indians as the Department of the Interior may see fit to locate thereon."

44. CROW CREEK RESERVATION (see also No. 5). Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, § 6, 25 Stat. 888, I *Kappler* 328, 329, "for the Indians receiving rations and annuities at the Crow Creek Agency."

45. DUCK VALLEY RESERVATION (see also No. 6). Executive Order of May 4, 1886, I *Kappler* 866, "for the use and occupation of the Paddy Caps band of Pi-Utes and such other Indians as the Secretary of the Interior may see fit to settle thereon."

46. FORT APACHE RESERVATION. Executive Order of November 9, 1871, I *Kapper* 812. See I *Kappler* 811 [letter from Indian Commissioner Colyer to Secretary of the Interior Delano indicating that Camp Apache Reservation established for the Coyoteros and Chiloccos of the roving Apaches of Arizona].

47. FORT BELKNAP RESERVATION (see also No. 11). Act of April 15, 1874, 18 Stat. 28, I *Kappler* 149, "for

the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate thereon." Act of May 1, 1888, 25 Stat. 113 (Article IX), I *Kappler* 261, 264, "for the Indians now attached to and receiving rations at the Fort Belknap Agency, Montana."

48. FORT BERTHOLD RESERVATION. Act of March 3, 1891, § 23, 26 Stat. 989, 1032, I *Kappler* 407, 426 (Article VI), "for the sole use and benefit of said tribes of Indians [the Arickaree, Gros Ventre and Mandan].

49. FORT PECK RESERVATION (see also No. 13). Act of April 15, 1874, 18 Stat. 28, I *Kappler* 149-50, "for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate thereon." Act of May 1, 1888, 25 Stat. 113 (Article IX), I *Kappler* 261, 264, "for the Indians now attached to and receiving rations at the Fort Peck Agency."

50. FORT TOTTEN RESERVATION. Treaty of February 19, 1867, 15 Stat. 505 (Article 4), II *Kappler* 956, 957-58, "for all other members of said bands (Sissitons and Warpetons Sioux) who were not sent to the Crow Creek reservation, and also for the Cut-Head bands of Yanktonais Sioux."

51. LOWER BRULE RESERVATION (see also No. 20). Treaty of April 29, 1868, 15 Stat. 635 (Article 2), II K*appler* 998, "for the absolute and undisturbed use and occupation of the Indians herein named, [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettler, Sans Arcs and Santee and Arapaho] and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, § 5, 25 Stat. 888, I *Kappler* 328, 329, "for the Indians receiving rations and annuities at the Lower Brule Agency."

52. **Lummi Reservation.** Treaty of Point Elliott, January 22, 1855, 12 Stat. 927, (Article 3), II *Kappler* 669, 670, "for the present use and occupation of the said [Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalk-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-quilch, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occuying certain lands situated in said Territory of Washington] tribes and bands." Executive Order of November 22, 1873, I *Kappler* 917, "for the use and occupation of the Dwamish and other allied tribes of Indians."

53. **Nisqually Reservation** (see also No. 27). Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (Articles 2 and 6), II *Kappler* 661, 662-63, "for the present use and occupation of the said tribes and bands [Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands]." "The President may . . . remove (the said Indians) from the reservations . . . or may consolidate them with other friendly tribes or bands. And he may further . . . cause the whole or any portion of the lands hereby reserved, . . . to be surveyed into lots, and assign them to such . . . as are willing to avail themselves of the privilege, and will locate on the same as a permanent home." Executive Order of Jan. 20, 1857, I *Kappler* 920, "for the Nisqually, Puyallup, and other bands of Indians in Washington Territory."

54. **Pine Ridge Reservation** (see also No. 30). Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United

States, to admit amongst them." Act of March 2, 1889, 25 Stat. 888, § 1, *I Kappler* 328, "for the Indians receiving rations and annuities at the Pine Ridge Agency."

55. PORT MADISON RESERVATION. Treaty of Point Elliott, January 22, 1855, 12 Stat. 927, (Article 2), II *Kappler* 669, 670, "for the present use and occupation of the said tribes and bands [Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalk-kamish, Skop-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-amish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-quilch, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington]." Secretarial Order of October 21, 1864, I *Kappler* 921, "for the benefit of the Indians referred to [in the Treaty of Point Elliott]."

56. PUYALLUP RESERVATION (see also No. 31). Treaty of Medcine Creek, Dec. 26, 1854, 10 Stat. 1132 (Articles 2 and 6), II *Kappler* 661, 662-63, "for the present use and occupation of the said tribes and bands [Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Pecksin, Squi-aitl, and Sa-heh-wamish tribes and bands]." "The President may . . . remove (the said Indians) from the reservations . . . or may consolidate them with other friendly tribes or bands. And he may further . . . cause the whole or any portion of the lands hereby reserved, . . . to be surveyed into lots and assign them to such . . . as are willing to avail themselves of the privilege, and will locate on the same as a permanent home." Executive Order of Jan. 20, 1857, I *Kappler* 920, "for the Nisqually, Puyallup, and other bands of Indians in Washington Territory."

57. ROSEBUD RESERVATION (see also No. 35). Treaty of April 29, 1868, 15 Stat. 635, II *Kappler* 998, "the Indians herein named [Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle,

Sans Arcs and Santee and Arapaho], and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Act of March 2, 1889, 25 Stat. 888, § 2, I *Kappler* 328, "for the Indians receiving rations and annuities at the Rosebud Agency."

58. SAN CARLOS RESERVATION. Executive Order of November 9, 1871, I *Kappler* 812; see I *Kappler* 811, (letter from Indian Commissioner Colyer to Secretary of Interior Delano) "for the roving Apache Indians of New Mexico and Arizona."

59. SISSETON RESERVATION. Treaty of February 19, 1867, 15 Stat. 505 (Article 3), II *Kappler* 956, 957, "for the members of said bands [the friendly bands of Sissitons and Warpetons Sioux here represented] who have heretofore surrendered to the authorities of the Government, and were not sent to Crow Creek reservation, and for the members of said bands who were released from prison in 1866."

60. SKOKOMISH RESERVATION (see also No. 37). Treaty of Point No Point, January 26, 1855, 12 Stat. 933, II *Kappler* 674, "for the present use and occupation of the said tribes and bands [different villages of the S'Klallams, Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes] . . . It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band . . . he shall be at liberty to do so." Executive Order of February 25, 1874, I *Kappler* 924, "for the use of the S'Klallam Indians."

61. SQUAXIN ISLAND RESERVATION. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132 (Article 2), II *Kappler* 661, 662, "for the present use and occupation of the said tribes and bands [Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands]."

62. SUMMIT LAKE RESERVATION (see also No. 39). Executive Order No. 1681, January 14, 1913, III *Kappler* 684, "for Paiute and Shoshoni Indians, and such other Indians as the Secretary of the Interior may settle thereon."

63. SWINOMISH RESERVATION. Treaty of Point Elliott Jan. 22, 1855, 12 Stat. 927, II *Kappler* 669, 670, "for the present use and occupation of the said [Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalk-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, snoho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-quilch, Sho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington] tribes and bands." Executive Order of September 9, 1873, I *Kappler* 925, [occupied by the Dwamish, Etakmur, Lummi, Snohomish, Sukwamish and Swinomish].

64. TULALIP RESERVATION. Treaty of Point Elliott, January 22, 1855, 12 Stat. 927 (Article 3), II *Kappler* 669, 670, "There is also reserved . . . land . . . with a view of drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory." Executive Order of December 23, 1873, I *Kappler* 925, "provided for in the third article of the treaty with the Dwamish and other allied tribes of Indians."

65. TULE RIVER RESERVATION (see also No. 40). Executive Order of October 3, 1873, I *Kappler* 831, "for the Tule River, King's River, Owen's River, Manche Cajon and other scattered bands of Indians in the State of California."

66. UMATILLA RESERVATION. Treaty of Camp Stevens, June 9, 1855, 12 Stat. 945, II *Kappler* 684, "The above-named confederated bands [Walla-Wallas, Cayuses, and Umatilla tribes and bands] of Indians."

67. **Warm Springs Reservation.** Treaty of June 25, 1855, 12 Stat. 963 II *Kappler* 714, "The above-named confederated bands [Taih or Upper De Chutes band of Walla-Wallas; Wyam or Lower De Chutes band of Walla-Wallas, Tenino band of Walla-Wallas, John Day's River band of Walla-Wallas, Dalles band of Wascoes, Ki-gal-twal-la band of Wascoes, Dog River band of Wascoes] of Indians."

68. **Yakima Reservation.** Treaty of June 9, 1855, 12 Stat. 951 (Article 2), II *Kappler* 698, 699, "for the use and occupation of the aforesaid confederated tribes and bands [Yakima, Palouse, Pisquouse, Wenatshapam, Kilikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Shin-pah, Wish-ham, Skyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat] of Indians."

Part 3 Reservations Created Without Specifying A Tribe As Beneficiary.

69. **Big Pine Reservation.** Executive Order No. 1496, March 11, 1912, III *Kappler* 677, "for allotment purposes to the Indians located thereon, and for such other uses as may be lawful for the benefit of the Indians."

70. **Bishop Reservation.** Executive Order No. 1496, March 11, 1912, III *Kappler* 677, "for allotment purposes to the Indians located thereon, and for such other uses as may be lawful for the benefit of the Indians."

71. **Camp Verde Reservation.** Act of August 1, 1914 § 2, 38 Stat. 582, 588, IV *Kappler* 13 appropriating funds "for the purchase of lands for the use and benefit of Indians under the jurisdiction of the Superintendant of the Camp Verde Indian School, Arizona."

72. **Colorado River Reservation.** Act of March 3, 1865, 13 Stat. 559, "set apart as the reservation for the Indians of the Colorado River and its tributaries." Executive Order of November 22, 1873 and Executive Order of November 16, 1874, I *Kappler* 803, (same).

73. **Fort Bidwell Reservation.** Joint Resolution of January 30, 1897, 29 Stat. 698, No. 7, "for the purposes of an Indian training school."

74. **Ford McDermitt Reservation.** Executive Order No. 1606, September 16, 1912, III *Kappler* 682, "for Indian allotment purposes."

75. **Lone Pine Reservation.** Act of April 20, 1937, 50 Stat. 70, § 3, V *Kappler* 513, "for the Indian tribe, band, or group concerned."

76. **Muckleshoot Reservation** (see also No. 24). Executive Order of April 9, 1874, I *Kappler* 918-19, "for the exclusive use of the Indians in that locality." Executive Order of January 20, 1857, I *Kappler* 920, "for the Nisqually, Puyallup, and other bands of Indians in Washington Territory."

77. **Navajo Reservation** (see also No. 25). Executive Orders of May 17, 1884 and November 19, 1892, I *Kappler* 876-77, "for Indian purposes." Executive Order of January 15, 1917, IV *Kappler* 1030, "for the use and occupancy of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon." Executive Order of April 13, 1927, IV *Kappler* 1050, "for Indian purposes." Executive Order No. 1359, May 24, 1911, III *Kappler* 686, "for Indian purposes."

78. **Round Valley Reservation.** Executive Order of March 30, 1870, I *Kappler* 828, "be set apart as an Indian reservation."

79. **Shoalwater Reservation.** Executive Order of September 22, 1866, I *Kappler* 924, "for Indian purposes."

80. **Tulalip Reservation** (see also No. 64). Treaty of Point Elliott, January 22, 1855, 12 Stat. 927 (Article 3), II *Kappler* 669, 670, "There is also reserved . . . land . . . with a view of drawing thereto and settling thereon all the Indians living west of the Cascade Moun-

tains in said Territory." Executive Order of December 23, 1873, I *Kappler* 925, "provided for in the third article of the treaty with the Dwamish and other allied tribes of Indians."

81. UINTAH & OURAY RESERVATION. Executive Order of October 3, 1861, I *Kappler* 900, "for the use and occupancy of Indian tribes." Act of May 5, 1864, 13 Stat. 63, "for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same."

82. WINNEMUCCA COLONY. Act of May 21, 1928, 45 Stat. 618, V *Kappler* 51, "for . . . Indians residing in the vicinity of Winnemucca, Nevada."

83. YERINGTON COLONY. Act of May 18, 1916, 39 Stat. 123 (Section 13), IV *Kappler* 53, 73, "for the nonreservation Indians in the State of Nevada."

Note: There are 83 reservations listed in Parts 1, 2 and 3, but 15 are duplicates (see notations), leaving a net total of 68.

APPENDIX G

RIGHTS OF INDIANS IN THE HOOPA VALLEY RESERVATION, CALIFORNIA

Indian Tribes: Tribal Government

> The Commissioner of Indian Affairs has been correct, as a matter of law, in recognizing tribal title to the communal lands of the 12-mile square Executive order reservation in the Hoopa Valley Tribe. The Commissioner has been further correct in paying out per capita payments as authorized generally by the act of March 2, 1907 (34 Stat. 1221), to enrolled members of the Hoopa Valley Tribe only.

Indian Lands: Tribal Lands: Generally—Indian Tribes: Tribal Government

> Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square.

Indian Lands: Possessory Rights

> It would be an unconstitutional taking to permit the Klamath River (Yurok) Indians to diminish the value of the right of occupancy in Hoopa Valley by paying to them a part of the proceeds of the resources taken therefrom. The Hoopa Indians have occupied this part of the reservation since 1865 and the benefits of such occupancy belong to them.

Indian Tribes: Reservations

> Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River Tribes, and both tribes rejected such a plan, it is our opinion that these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the total reservation both as to government and as to economic resources. Such a confederation or consolidation has not taken place.

M-36450 FEBRUARY 5, 1958.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This opinion is given in response to your request for a determination of the legality of recent per capita distributions to members of the Hoopa Valley Tribe of California. The per capita payments were made by request of the recognized governing body of the Hoopa Valley Reservation. Recipients are those persons whose names appear on the tribal membership roll approved by the Commissioner on March 25, 1952. The official membership roll approved October 1, 1949, contains the names of allottees, their descendants, unallotted residents of the 12-mile square area of Hoopa Valley who were eligible to receive allotments at the time the allotments were made, and other persons made members of the tribe by adoption.[1]

---

[1] Constitution and Bylaws of Hoopa Valley Tribe in California, article IV, *Membership*, approved September 4, 1952. See Appendix 1, p. 69. *Cf.* also letter of Superintendent Boggess to Commissioner on January 13, 1947, re Hoopa Business Council resolution declaring all lands and resources of 12 miles square to be property of Hoopa Valley Indians alone.

It has been contended on behalf of certain members of the Yurok Tribe that Indians and their descendants who were allotted on lands formerly known as the Klamath River Reservation and on that portion of the enlarged Hoopa Valley Reservation commonly referred to as the "Connecting Strip" or "Extension" are entitled to share equally in the payments from the proceeds of timber sales on the area comprising the original Hoopa Valley Reservation. It is further alleged that the Bureau of Indian Affairs improperly authorized the disbursal of per capita payment money at the request of the Hoopa Valley Business Council because the Hoopa Valley Tribal Constitution under which it acts is invalid.

A group of Indians had been politically recognized as a Hoopa Tribe by the United States as early as 1851 when a treaty was negotiated with the "Hoo-pah" or, as they were sometimes otherwise called, the Trinity River Indians. Although this treaty was never ratified, it is convincing evidence of the existence of a Hoopa tribal group. Later, this tribal group exercised the rudiments of community government over the Indians of an area comprising the 12-mile square original Hoopa Valley Reservation and were thus qualified for political recognition as a tribe occupying the reserved group. We have seen no evidence, or contention, that any other tribal group claimed, at that time, any governmental or economic jurisdiction over the 12-mile square area of the original Hoopa Valley Reservation.

Subsequent to the admission of California as a State, the announced intent of Congress was to collect the various groups of Indians in California and to locate them on reservations set aside to afford protection against the encroachment of white settlers. On April 8, 1864 (13 Stat. 39), Congress authorized the President, in his discretion, to set aside not more than four tracts of land in California to be retained by the United States as Indian reservations, suitable in extent to accommodate the Indians in that State. The lands were to be located as remote from white settlements as possible, having due regard for their adaptability for the purpose for which they were intended. The act further provided that at least one of the reservations be located in what had theretofore been known as the "Northern District." Pursuant to this act, the Hoopa Valley Reservation was established as one of the four reservations contemplated by the legislation.

Administrative actions looking toward the setting aside of this area as an Indian reservation were begun on August 21, 1864; and by 1865 a number of Hoopa Indians had already been located in Hoopa Valley which was formally reserved by Executive order in 1876.

The Executive order establishing the Hoopa Valley Reservation provided:

> EXECUTIVE MANSION, June 23, 1876. It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River, surveyed in 1875 by C. T. Bissel, and the courses and distances of the east boundary, and the portion of the north boundary east of Trinity River reported but not surveyed by him, viz: Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked "H. V. R., No. 3"; thence south 17½° west 905.15 chains to southeast corner of the reservation; thence south 72½° west 480 chains to the mouth of Trinity River, be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864. (13 Stats., p. 39.)
> U. S. GRANT.

It should be noted that this Executive order designates no particular tribe or class of Indians as the inhabitants of the area set aside. The order, therefore, must be construed as setting aside the reserve for the benefit of any Indians who were then occupying the area and those who availed themselves of the opportunity for settlement which the reservation presented from time to time. When the President formally set the boundaries of the Hoopa Valley Reservation on June 23, 1876 a "Hoopa Tribe," composed of remnants of the Hunstang, Hupa, Redwood, Saiaz, Sermalton, Miskut, and Tishtang-a-tan bands of Indians, was already well established thereon. This tribe became stabilized in the area and somewhere along the line adopted a constitutional form of government and ever since has maintained its local integrity. The records of the Indian Bureau show that by 1916 the group was well organized with a representative tribal council.

> This [Hoopa] council is composed of Indians living on the Hoopa Valley Reservation proper and represents all of the tribes not now extinct enumerated in the Act of Congress and presidential proclamation setting aside this as an Indian Reservation * * *. The Hoopa Council are the duly authorized representatives of the Indians in Hoopa Valley Reservation.[2]

The "Hoopa Valley Tribe" has continually exercised tribal governmental functions within the confines of the Hoopa Valley Reservation as established by the Executive Order of June 23, 1876, and is the proper organization for carrying on the functions of administering and managing whatever communal property or land may be owned or beneficially held by that tribe. We note that the tribe in 1949 adopted a written constitution which apparently fairly included as members all persons enrolled on the official roll of the Hoopa Valley Tribe and all children, of at least one-quarter Indian blood, born to such members.

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[2] Letter from Superintendent Morsdolf to Commissioner of Indian Affairs, June 19, 1916.

We conclude, therefore, that as a matter of law the Commissioner of Indian Affairs has been correct in recognizing tribal title to the communal lands in the 12-mile square reservation to be in the Hoopa Valley Tribe. Cf. *Spalding* v. *Chandler*, 160 U.S. 394 (1896), 34 Op. Atty. Gen. 181 (1924). The superior title of the Government in tribal lands and in allotted lands where no patents have been issued, implies, of course, wise management. It does not confer on the Government the right to despoil a tribe or an allottee of accrued rights. *St. Marie* v. *United States*, 24 F. Supp. 237, 240 (1938). The Commissioner has been correct in paying out per capita payments, authorized by the act of March 2, 1907 (34 Stat. 1221), only to enrolled members of the Hoopa Valley Tribe. This action is consonant with the principle that the test of the privilege of an individual Indian to share in tribal resources is tribal membership. *Halbert* v. *United States*, 283 U.S. 753 (1931).

We now turn our attention to the contention that Indians other than the enrolled members of the Hoopa Valley Tribe have a claim of right to an interest in the communal lands and resources of the Hoopa Valley Reservation because the 12-mile square reservation was enlarged by the addition of a contiguous area of land on which Indians of other bands were residing.

The first pertinent act of Congress providing for reservations for the Indians of California was the act of March 3, 1853 (10 Stat. 238). This act authorized the President to "make five military reservations from the public domain in the State of California * * * for Indian purposes." The act limited the area which might be reserved to 25,000 acres and appropriated $250,000 for subsistence and costs of removing the Indians to the reserved areas. One of the areas so reserved was the Klamath River Reservation established November 16, 1855, by the Executive order of President Franklin Pierce.

In the year 1861, a flood destroyed the arable lands of the Klamath River Reservation and some of the Indians located thereon were removed to a new temporary reservation known as the Smith River Reserve, established May 3, 1862. A majority of these Indians preferred to reside on the old reservation, however, and nearly all of them returned within a few years to the Klamath River area. Meanwhile, by the act of April 8, 1864, *supra*, the State of California was constituted one superintendency for the administration of Indian affairs and the President was authorized to set apart four additional tracts of land within the State for Indian purposes. There were already in existence at that time the following reservations: Klamath River, Mendocino and Smith River. Both the Mendocino and Smith River reservations were later discontinued by the act of July 27, 1868 (15 Stat. 221, 223). During this time, the Klamath River lands were treated as a distinct reservation administered by an Indian agent of the United States who also oversaw the affairs and development of the Hoopa Valley Reservation approximately 20 miles away. As an aid to the administration of these two separated areas, they were brought together later under the Executive Order of October 16, 1891, which reads as follows:

> EXECUTIVE MANSION, October 16, 1891. It is hereby ordered that the limits of the Hoopa Valley Reservation, in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in said State by act of Congress approved April 8, 1864 (13 Stats., 39), be, and the same are hereby, extended so as to include a tract of country 1 mile in width on each side of the Klamath River, and ex-

> tending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean: *Provided, however*, That any tract or tracts included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended. BENJ. HARRISON.

The limits of the Hoopa Valley Reservation were thus extended by the Executive Order of October 16, 1891, to include a tract of land containing approximately 25,635 acres, 1 mile in width on each side of the Klamath River, extending from the limits of the Hoopa Valley Reservation to the Pacific Ocean. This enlarged Hoopa Reservation took a shape similar to that of a spoon with the Hoopas located in its bowl and the Klamath River Indians strung out along its handle. The following year, under the act of June 17, 1892, Congress discontinued the Klamath River Reservation as such, but preserved some rights for Indians previously located on that reservation by providing for allotments to all Indian applicants who made their selection thereon within 1 year. All lands not selected for allotment were opened to settlement under the public land laws. Indians who removed from the former Klamath River Reservation were relocated on the connecting strip and elsewhere, and the Klamath River Tribe became widely scattered.

The Klamath River Indians, whose ancestors formerly resided on the Klamath River Reservation, have consistently been regarded as an identifiable tribe by the Federal Government. See 33 L. D. 205, 218 (1904). These Indians are also included in the general term "Yurok" meaning downstream Indians although a Yurok Tribe, as such, was not organized until recent years. The "Yurok Tribe" has never been recognized as having jurisdiction over any part of the "Hoopa Extension" because its membership is not confined to reservation Indians.[3]

We can find no evidence to indicate that the enlargement of the reservation was intended in any way to upset the property interests of the Hoopa Tribe to the original area under its jurisdiction. We read nothing in the Executive Order of 1891 to show an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation.

The former Klamath River Reservation and the connecting strip are, technically, a part of the enlarged Hoopa Valley Reservation. However, to construe the order enlarging the Hoopa Valley Reservation as divesting the Hoopa Valley Tribe of their rights in their communal property would be contrary to established law. The rights of Indians to property within reservations attach when the lands are set aside. 34 Op. Atty. Gen. 171, 176 (1924). *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U.S. 339 (1941). The rights of the Hoopa Indians to the Hoopa Valley Reservation antedate the Executive Order of 1891. Such vested rights in the land are not affected, without the tribe's consent, by a subsequent order enlarging the area of the reservation. To distribute the income from the assets of the original part of the Hoopa Valley Reservation to all the Indians in the Northern District of California would be to give to many of them the benefit of a right to which they are not entitled. Congress, as a trustee for unassimilated Indians, has power to legislate for the proper control and management of such of their property as is held by the Government in a trust capacity, but this power is not so extensive as to enable the Government "to give the tribal lands to others, or to appropriate them to his own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), citing *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307-308 (1902). Cf. *United States* v. *Klamath and Moadoc Tribes et al.*, 304 U.S. 119 (1938). It would be an unconstitutional taking diminishing the value of the Hoopa Indians' right of occupancy, if the Klamath River (Yurok) Indians were permitted to share the proceeds of the resources taken from the 12-mile square. The Hoopa Indians have occupied the 12-mile square area of the reservation since 1865 and the benefits of such occupancy belong to them. *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937). Each and every individual member of the many tribes or bands of California Indians was privileged after 1865 to settle upon this reservation. None of them was required to do so. Those who accepted became vested with the full incidents of Indian title. Those who did not accept, and chose to remain where they were, or move elsewhere, cannot be properly regarded as being invested with enforceable rights thereon either in themselves or in their posterity. *Cf.* Sol. Op. M-36181. Ownership of Unallotted Lands on the Tulalip Indian Reservation in the State of Washington, February 21, 1956.

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[3] Yurok Tribe, incorporated under laws of California, October 24, 1949. The organization is recognized for the purposes for which it was formed namely "to promote the cultural, social, educational and economical well being of members of the Yurok Tribe." Letter from Assistant Commissioner to Mrs. Lowana Brantner, November 26, 1954.

It has been alleged that the Hoopas withdrew from an existing Hoopa-Klamath tribal organization without knowledge or consent of the Klamaths. In view of the history of these tribes as set out above, that assertion is not well founded. On the contrary, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore, the action by which the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice.

The Hoopa Indians have actively attempted for more than half a century to preserve their interests in the Hoopa Valley Reservation and to keep the Klamath River Indians, and any others, from acquiring any tribal right in the area of the original 12-mile square. There is nothing in the records to indicate a recession from the position they held before Klamath River lands were annexed to the Hoopa Valley Reservation. A study of the various actions taken in connection with the allotment of land on the reservations discloses the active resistance of the Hoopa Tribe to the encroachment and claims of other tribes and other Indians. At a time when a number of outsiders were attempting to obtain allotments at Hoopa Valley, the tribal council, anxious to preserve the reservation for Indians of the Hoopa Tribe, stated in a letter dated June 19, 1916, to the Commissioner of Indian Affairs:

> There are certain tribes that are regarded as having tribal rights on the Hoopa reservation. This we cannot understand. Take the Klamath for instance—they represent a different tribe, talk a different language, and have never associated with the Hoopas to amount to anything. As near as we can understand the Hoopa and Klamath River reservation were allotted twenty some odd years ago. The Klamath are today enjoying the rights of their allotments, own their lands and homes. While the Hoopas have had their land resurveyed and are now waiting to receive their allotments and are still uncertain about our land, and still they say we are linked with the other tribes—surely there must be a mistake somewhere * * *.

In reply, the Indian Bureau stated that only those persons enrolled as Indians on the Hoopa Valley Reservation or voluntarily adopted by the tribal business committee could be granted "any benefits whatever as Indians of the Hoopa Valley Reservation."[4] Allotment rolls for Hoopa Valley were closed in 1923, but were subsequently reopened when other surveys were subsequently made in 1929 and 1933.

In May of 1932, the Superintendent wrote to the Commissioner requesting definite instructions for the allotting of the Hoopa Valley. At that time about 175 selections of land for allotment had been on file at the agency for a period of nearly 5 years, and many Indians were in possession of definite tracts and had improved such lands. With respect to the situation on the reservation, the Superintendent made this observation:

> The Office should understand that the great majority of these Indians feel that the Klamath and the Hoopa countries are separate and distinct and there is no fixed desire on the part of the Hoopas to take over any unallotted Klamath lands, and the great majority of the Klamaths have no desire to come in and take over Hoopa country. I am not unmindful of previous statements that have been made to me by the Office to the effect that it is considered by the Office as one reservation only.

The reply to this letter announced that a representative of the Commissioner was on his way to the reservation and would "go over the situation * * * on the ground."[5]

Shortly thereafter, special allotting agent Charles E. Roblin was sent to Hoopa Valley to study the matter and report his views. The Roblin report, dated November 19, 1932, recommended that further allotments be authorized on the Hoopa Valley Reservation but that such allotments be limited to the agricultural lands, with the right to such allotments given only to those who had already occupied and improved these lands for beneficial use. Two months later, in a supplemental report, Agent Roblin withdrew his recommendation that actual use be a condition precedent to allotment and recommended that claimants whose selections covered surveyed lands have their selections confirmed, provided that the individual's enrollment on the Hoopa Valley Agency rolls was regular and that he was entitled to allotment. Roblin further stated that among the Indians, a sentiment of urgency prevailed "based largely on a desire of the Hoopa Indians to exclude the Klamath River and Lower Klamath Indians from allotment on the original Hoopa Valley Reservation." It was Roblin's opinion "that the objection to the rights of these claimants *as a class*, should be disregarded." The Commissioner agreed that Indians from the "Connecting Strip" and the former Klamath River Reservation should be allotted equally with those already living on the original Hoopa Valley Reservation, but conceded that there was not sufficient available land to allot all these Indians thereon. Therefore, he approved only the allotment schedules which had been previously submitted by the Hoopa Tribal Council in 1921 stating, "after the schedules referred to above, no further allotments at Hoopa Valley will be made at this time." All unallotted lands were then held for tribal use under a proposed Indian Reorganization Act.

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[4] Letter from Chief Clerk, Indian Bureau, to Superintendent, Hoopa Valley School, July 17, 1916.

[5] Letter to Superintendent from Assistant Commissioner, dated September 16, 1932.

Subsequently, on November 20, 1933, the Commissioner of Indian Affairs approved a constitution and bylaws of the Hoopa Business Council which provided in part:

> Article III. The business council shall be composed of seven enrolled members of the Hoopa tribe; bona fide residents of Humboldt County, California, and twenty-one years of age or over.

The council represented only the Indians of the 12-mile square Hoopa proper. The Klamath River Extension was not represented on this council, and has not been represented there since.

As a result of the enactment of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 986), a question arose as to whether a single referendum should be held on the enlarged Hoopa reservation; or whether separate elections should be held on the two areas permitting each section to determine its own destiny. On October 20, 1934, Commissioner John Collier communicated his decision to Mr. Roy Nash, District Coordinator for Reorganization Act in a letter containing the following sanction:

> Superintendent Boggess is authorized to hold two separate elections on the Hoopa Valley Reservation, one of them on Hoopa Valley proper for the Hoopa, and another election on the territory occupied by the Klamath Indians, when the Secretary calls such election.

The records further show that on December 15, 1934, the Indians on the Hoopa Valley Reservation voted to make the Indian Reorganization Act inapplicable on that reservation. The Klamath River Indians also opposed the application of the act to lands occupied by themselves. Thus, in two separate elections, which might have resulted in more closely tying the extension lands with the original 12-mile square area, both the Hoopa Indians and the Klamath River Indians defeated the reorganization measure. The total of votes for each of these tribes is recorded separately.[6]

Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River tribes, and both tribes rejected such a plan, these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the entire reservation. Such a confederation or consolidation has not taken place.

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[6] Haas, "Ten Years of Tribal Government Under I. R. A.," U.S. Indian Service, 1947, p. 14.

In summary, it is our opinion that the contentions on behalf of the Yurok Indians have not been substantiated, and that the Bureau of Indian Affairs has properly carried out its responsibilities in the premises. In reply to your specific questions, no Indians other than those enrolled as members of the Hoopa Tribe of the original 12-mile square reservation and their descendants, have rights of participation in the communal property on that part of the Hoopa Valley Reservation.

The Indian inhabitants of the Hoopa extension and the other areas outside the jurisdiction of the Hoopa Valley Tribe may associate as a separate Indian tribe, or tribes, under constitutions acceptable to them and to the Bureau of Indian Affairs. But no such association can work to vest such Indians with an interest in the Hoopa Valley proper.

EDMUND T. FRITZ,
Deputy Solicitor.

APPENDIX H

BUREAU OF INDIAN AFFAIRS
Office of Economic Development
Real Estate Services
Real Property Management

ANNUAL REPORT ON INDIAN LANDS

June 30, 1971

Compiled by: Betty Jo Counselman
As of June 30, 1971

SUMMARY OF INDIAN RESERVATIONS

The number of Indian-owned trust or restricted land areas currently having some degree of Federal supervision under programs of the Bureau of Indian Affairs are as follows:

Continental United States

Those areas commonly referred to and which have been designated as "reservations" total 265. Included in this broad category are the well-known reservations, together with the rancherias, pueblos, colonies or communities. There are 136 reservations containing only tribal-owned lands, 7 containing only individually-owned allotted land, and 122 reservations comprise of both tribal and allotted lands.

Sixteen areas contain widely scattered public domain allotments which for reporting purposes have been combined. Two of these have the public domain allotments in a fairly compact group and have been designated according to the community name as the Burns Paiute Band and the Dallas Unit in Oregon.

Sixteen reported groups of other off-reservation lands are closely supervised by Bureau agencies located on reservations. Of these off-reservation lands, 7 scattered groups were purchased by members of the Osage Tribe and are located in 7 different States.

There are 22 Government-owned tracts of land outside reservations on which miscellaneous facilities have been constructed for Indian use or administrative activities. These sites include the United Tribe Center of Burleigh County, North Dakota; Celilo Village Fishing Sites, Oregon and Washington; Wildhorse Reservoir, Nevada; and various non-reservation boarding schools, dormitories, and a sanitorium.

Alaska

There are 2 Communities with tribal or Community owned land (Metlakatla and Klukwan) and 99 Communities and reserves with Government-owned land. There are 200 individually-owned Native allotments throughout the State.

There are 211 Communities or villages in the State that have a population of 25 or more Natives.

Thirty-five Native townsites established and patented to a trustee with both restricted and non-restricted deeds issued.

The Bureau of Land Management is preparing surveys and townsite plats for 67 Native townsites, currently 31 of these surveys have been completed and the plats approved, being ready for patent to a trustee.

The Bureau operates 53 day schools in the State with jurisdiction of Bureau schools being transferred to the State of Alaska as rapidly as the State can accept these operations in their system.

SACRAMENTO AREA (Cont.)	Tribal	Individually Owned	Govt-Owned	Total
CALIFORNIA (Cont.)				
CALIFORNIA AGENCY (Cont.)				
Sherwood Valley Rancheria	292.22	—	—	292.22
Shingle Springs Rancheria	160.00	—	—	160.00
Stewarts Point Rancheria	40.00	—	—	40.00
Sulphur Bank Rancheria	50.00	—	—	50.00
Susanville Reservation	30.00	—	—	30.00
Tule River Reservation	54,116.00	—	—	54,116.00
Tuolumne Rancheria	323.10	—	—	323.10
X. L. Ranch Reservation	9,254.86	—	—	9,254.86
Yokayo Rancho	—	—	.50	.50
HOOPA AREA FIELD OFFICE				
Big Bend Rancheria	40.00	—	—	40.00
Big Lagoon Rancheria	5.50	—	—	5.50
Hoopa Valley Reservation	84,744.16	1,328.88	—	86,073.04
Hoopa Valley Reservation Extension	3,421.00	3,417.11	—	6,838.11
Montgomery Creek Rancheria	72.00	—	—	72.00

Public Domain Allotments	408.37	6,073.20	—	6,481.57
Resighini Reservation (Coast Indian Community)	228.00	—	—	228.00
Roaring Creek Rancheria	80.00	—	—	80.00
Trinidad Rancheria	54.60	—	—	54.60
PALM SPRINGS OFFICE				
Agua Caliente (Palm Springs)	2,055.83	23,843.01	—	25,898.84
RIVERSIDE AREA FIELD OFFICE				
Augustine Rancheria	341.80	160.49	—	502.29
Barona Rancheria	5,005.00	—	—	5,005.00
Cabazon Reservation	1,153.21	548.32	—	1,701.53
Cahuilla Reservation	18,272.38	—	—	18,272.38
Campo Reservation	15,010.00	—	—	15,010.00

Opposition

1

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Nos. 81-1371, 81-1373

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA and the HOOPA VALLEY TRIBE,
Petitioners,

vs.

JESSIE SHORT, *et al.*,
Respondents.

RESPONSE OF CERTAIN RESPONDENTS TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, and to MOTIONS FOR LEAVE TO FILE BRIEFS OF AMICI CURIAE BY THE QUINAULT INDIAN NATION, THE NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND GILA RIVER INDIAN COMMUNITY.

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TABLE OF CONTENTS

Page

Statement of the Case 1

Summary of Argument 6

Argument 8

I.

Nothing Has Occurred in the Instant Case Since This Court Last Denied Petitions for Writ of Certiorari to Cause the Court to Reverse Its Prior Position. 8

II.

The Manner in Which Petitioners Have Framed the Questions Presented to This Court Illustrate Their Bad Faith in These Proceedings. 10

III.

The Court of Claims' Decisions and the Award of Monetary Damages to Individual Plaintiffs Create No Conflict With the Traditional Concept of Communal Ownership of Land by Indians. 14

IV.

Nothing in the Award of a Money Judgment to Respondents Will Result in a Termination of the Hoopa Valley Tribe. 17

V.

The Court of Claims' Decisions Pose No Threat to Other Indian Reservations Throughout the United States. 19

VI. Page

The Court of Claims' Decisions Do Not Interfere in Questions Reserved to the Political Branches of the Government. 20

VII.

Petitioners Misinterpret the Legislative Intent in the 1964 Amendment of 25 U.S.C. 407. 22

VIII.

Petitioners Have Demonstrated No Conflict Between the Decision of the Court of Claims in the Instant Case and the Decision of the United States Court of Appeals for the Ninth Circuit in *Blake v. Arnett*. 23

IX.

No Necessity Has Been Demonstrated for Briefs of Amici Curiae and the Motions for Leave to File Such Briefs Should Be Denied. 24

X.

Conclusion 26

TABLE OF AUTHORITIES

Page

Cases

Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981) 23, 24

Clyde F. Thompson v. United States, 122 Ct.Cl. 348 (1952) 16

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) 15, 16

Eastern Band of Cherokee Indians v. United States, 177 U.S. 288 (1885) 15

Eastern Cherokees v. United States, 45 Ct.Cl. 229 (1910) 15

Journeycake v. Cherokee Nation and the United States, 28 Ct.Cl. 281 (1893) 15

Prairie Band of Potawatomi Indians v. United States, 143 Ct.Cl. 131 (1958) 15

Shoshone Tribe v. United States, 299 U.S. 476 (1937) 15

Sizemore v. Brady, 235 U.S. 441 (1914) 16

United States v. Southern Pacific Transportation Co., 543 F.2d 676 (1976) 17

Miscellaneous

Page

1 U.S. Code, Congressional and Administrative News, 88th Congress, 2nd Sess., 1964 Laws and Legislative History, pp. 2162-2163 (House Report No. 1292) 22, 23

Rules

Court of Claims Rules, Rule 131(c) 2, 4

United States Supreme Court Rules, Rule 17 8

United States Supreme Court Rules, Rule 36.1 24

United States Supreme Court Rules, Rule 36.3 24

Statutes

United States Code, Title 25, Sec. 407 ....22, 23

United States Code, Title 25, Sec. 651 11

United States Code, Title 25, Sec. 659 11

United States Code, Title 28, Sec. 1491 21

Nos. 81-1371, 81-1373

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA and the HOOPA VALLEY TRIBE,
Petitioners,

vs.

JESSIE SHORT, *et al.*,
Respondents.

RESPONSE OF CERTAIN RESPONDENTS TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS,

and to

MOTIONS FOR LEAVE TO FILE BRIEFS OF AMICI CURIAE BY THE QUINAULT INDIAN NATION, THE NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND GILA RIVER INDIAN COMMUNITY.

Statement of the Case.

The instant case was initiated in March 1963, on behalf of certain of the Respondents seeking to appear as representatives of a class, to secure for those Indians of the Hoopa Valley Reservation, who are not members of Petitioner Hoopa Valley Tribe of Indians, aliquot shares of the profits derived from the sale of certain timber resources found on the unallotted land of a portion of the Reservation (the Square). These unallotted lands are held in trust for the Indians by Petitioner the United States.

After an unsuccessful motion in the Court of Claims to dismiss the action, the United States requested that the complaint be amended to include as named Plaintiffs (Respondents here) all Respondents meeting the standards of the class of Indians who would be entitled to recover if the court entered judgment in their favor. The complaint was subsequently amended to set forth the names of 3,323 individual Respondents.

To simplify the litigation, the cases of 26 of these Respondents were chosen for trial. In its Decision of October 17, 1973, 202 Ct.Cl. 870,[1] the Court of Claims found against the United States on the question of liability. The Court determined that 22 of the 26 sample Respondents "are entitled to recover in amounts to be determined under Rule 131(c) and the claims of the others are set down for trial in accordance with the opinion." (B112)

In an exhaustive review of the history of the Reservation, and rights of the Indians thereon, the Court of Claims determined that:

> 1. The Hoopa Valley Reservation was created pursuant to the Act of April 8, 1864 which authorized the President to set apart and locate not more than four Indian reservations in California, of such size as he found suitable, at least one of which was to be in the northern district, for the accommodation of the Indians of California, without specification of the tribes to be so accommodated. The President had discretion to authorize any Indian tribes of California to reside upon

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[1] The entire decision is set forth in Appendix B to the Petition for Writ of Certiorari of the Hoopa Valley Tribe of Indians. All references to the decision are to the appropriate pages of Appendix B.

such reservations as he set apart, and no Indian tribe resident upon a reservation created under the Act could obtain vested rights to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation. (B99)

2. By Presidential Order of June 23, 1876, the Hoopa Valley Reservation was established as one of the Indian reservations authorized to be set apart in California by the Act of April 8, 1864. The area included in the reservation, pursuant to the Presidential Order of June 23, 1876, included the land (the Square) upon which exists the timber reserves involved in the instant case. (B100)

3. By further Presidential Order on October 16, 1891, the boundaries of the reservation were extended to include additional territory (the Addition) upon which resided the ancestors of most of the Respondents. The court held that "the plain and natural effect of the order was to create an enlarged reservation in which the Indians of the original reservation and the Indians of the added tracts would have equal rights in common." (B101)

4. In 1950, certain of the Indians on the original portion of the reservation organized as the Hoopa Valley Tribe of Indians. Membership in the tribe was so defined as to exclude from membership a majority of the Indians of the Reservation including Respondents. (B85-92)

5. Until 1955 revenues derived from all parts of the Hoopa Valley Reservation were deposited in a single United States treasury account. (B95) Commencing in 1955, however, revenues derived from the sale of timber on the Square portion of the Reservation were deposited in a separate account and payments of said revenue were made by the United States exclusively to the Hoopa Valley Tribe and its members. (B96-97)

6. The court held that the United States "acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to income from the unallotted trust status lands on the Square. Such of the (Respondents) as are found herein to be Indians of the Reservation will become entitled to share in the income from the entire Reservation, including the Square, equally with all other such Indians, including the Indians of the Square." (B105)

7. Twenty-two sample Respondents were determined to be Indians of the Reservation entitled to recover a money judgment from the United States, the amount of which was to be determined under Court of Claims Rule 131(c), after determination of the entitlements of the remaining Respondents. (B105-112)

In response to the 1973 Decision of the Court of Claims, both Petitioners filed Petitions for Writ of Certiorari in this Court. The Petitions were denied, 416 U.S. 961, and rehearing was also denied, 417 U.S. 959.

Thereafter, on April 23, 1976, the Court of Claims permitted the intervention of an additional 515 Respondents and ordered that "to the extent that this action has been treated as a class action, it is ordered that the class is hereby closed. . . ." Order of April 23, 1976, 209 Ct.Cl. 776.

Subsequent to the Court of Claims' determination of liability in 1973, a complex procedure was established by the trial judge, in consultation with the parties, through which the individual entitlement claims of the various Respondents could be advanced and/or challenged. This procedure included the preparation of a detailed Declaration/Questionnaire by each individual Respondent, describing his or her ancestry, Indian blood degree, and association with the Hoopa Valley Reservation. Petitioners, in turn, prepared detailed responses to each of these Declaration/Questionnaires; and Respondents' counsel then prepared an individual reply to each of the joint responses by Petitioners.

Following this process, a series of motions and cross-motions for summary judgment were offered in the Court of Claims, with the result that the entitlement of an additional 120 Respondents was conceded and summary judgment for said Respondents was granted in Orders dated December 3, 1976, February 25, 1977, and April 27, 1978. Motions for summary judgment approving the claims of the remaining Respondents, and cross-motions by Petitioners to deny those claims, were fully briefed before the trial judge in 1977.

After an unsuccessful effort at mediation, which occupied most of 1978, the trial judge turned his attention to the motions for summary judgment.

On May 23, 1979, however, the United States made a motion to substitute a "Yurok Tribe" for the individual named Respondents. On July 23, 1979, the Hoopa Valley Tribe sought leave to file a companion motion to dismiss the case on the ground that the formulation of entitlement standards by the court involved the determination of a non-justiciable political question. Leave to file the motion was allowed on November 16, 1979. These motions, which sought to re-litigate issues previously decided by the Court, were initiated almost 17 years after the filing of the complaint.

On September 23, 1981, the Court of Claims upheld the recommended decision of the trial judge to deny both motions primarily on the ground that all of the issues raised by the motions had been repeatedly rejected during the course of the litigation.[2] (A7 and A11)

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[2] The entire decision is set forth in Appendix A to the Petition for Writ of Certiorari of the Hoopa Valley Tribe of Indians. All references to the decision are to the appropriate pages of Appendix A.

Noting that "this suit was begun in 1963 and, except for cases transferred to us from the Indian Claims Commission, it is the oldest case on our docket," (A13) the Court of Claims ordered the entitlement proceedings expedited, and remanded the matter to the trial judge "to issue by April 1, 1982, a recommended decision determining, under standards he will formulate in accordance with this opinion, which of the Plaintiffs whose cases are ready for disposition are Indians of the Reservation." (A16)

In January, 1982, Petitioners filed Petitions for Writ of Certiorari.

In February, 1982, the Quinault Indian Nation, the National Congress of American Indians, National Tribal Chairmen's Association, Salt River Pima-Maricopa Indian Community, and Gila River Indian Community filed motions for leave to file briefs as amici curiae in support of the Petitions for Writ of Certiorari.

Summary of Argument.

The instant case, which is now one of the oldest cases before the Court of Claims, will never be concluded if Petitioners are permitted to again and again re-litigate questions already decided by the courts. Petitions for Writ of Certiorari by the same Petitioners were denied in 1974 and the Court of Claims has since adopted no rule of law different from those set forth in its 1973 decision.

The decision of the Court of Claims to award a monetary judgment to individual Respondents in these proceedings creates no conflict with the traditional concept of communal ownership of Indian lands. Nor will the Court's decision cause any termination of the Hoopa Valley Tribe, or threaten the existence of other Indian reservations throughout the United States.

The adjudication of claims for money against the United States, whether by individual Indians or others, is the historic function of the Court of Claims. Contrary to the allegations of Petitioners, the Court has made no attempt to determine membership of an Indian tribe, nor has it intruded into areas reserved to the political branches of the government.

The arguments presented by Petitioners are wholly specious and constitute a cloak behind which Petitioners seek vindication of a continued misapplication of the proceeds of trust assets for the benefit of those not entitled to said proceeds.

ARGUMENT.

I.

Nothing Has Occurred in the Instant Case Since This Court Last Denied Petitions for Writ of Certiorari to Cause the Court to Reverse Its Prior Position.

Petitions for Writ of Certiorari, filed by the same Petitioners, were denied by this court in 1974.

Rule 17 of the Supreme Court states in pertinent part:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore."

No sound reason is advanced by Petitioners for a different exercise of discretion by the court at this time.

All of the matters to which Petitioners take exception were decided by the Court of Claims in 1973, prior to the filing of the original Petitions for Writ of Certiorari. In essence, the Court of Claims decided that:

1. The Hoopa Valley Reservation was one integrated reservation in which all Indians of the Reservation had an equal right to share in the distributions of revenue from the unallotted timber resources of the Reservation; and
2. Certain of the individual Respondents were entitled to recover as Indians of the Reservation; with the cases of the remaining Respondents to be tried to determine if they, too, qualified as Indians of the Reservation.

Now, eight years later, the Court of Claims in its 1981 decision has merely reaffirmed its 1973 decision, and instructed the trial judge to complete the process of determining which of the remaining Respondents are entitled to recover.

The Hoopa Valley Tribe seeks to mislead this court when it states:

> "The 1981 Decision of the Court of Claims is the first substantive opinion of the court itself in this case; its summary affirmance in 1973 of the cryptic 115-page recommended decision of the Commissioner gave little indication of the true direction in which the Court of Claims was moving. Now, for the first time, the court has revealed that it has departed from the well-settled rule that unallotted reservation property is held tribally, not individually." (Petition of Hoopa Valley Tribe, p. 15)

The above cited statement of the Hoopa Valley Tribe can hardly have been made in good faith since the 1981 decision of the Court merely reaffirmed its 1973 findings as to the liability of the United States and the entitlement to recover of individual Respondents. The Court of Claims broke no new ground in its 1981 Decision, but merely established a reasonable time-table within which the remaining entitlement determinations must be completed.

In its Petition, the United States even more overtly seeks a review, denied by this court in 1974, of the Court of Claims' 1973 Decision. The United States argues:

> "The fundamental error of the Court of Claims, underlying both its 1973 and 1981 Decisions and provoking other erroneous rulings, is the holding that Indians of the Klamath River Reservation and the Connecting Strip have a right to the benefit of the timber revenues derived from unallotted lands on the original Hoopa Valley Reservation." (Petition of the United States, p. 17)

Since the 1974 denial of Petitioners' Petitions for Writ of Certiorari, there has been no new statute enacted by Congress, nor any decisional law made by this court which conflicts with the 1973 Decision of the Court of Claims. The only change in events since 1973 is that in 1981 the Court of Claims moved closer to a final determination of the entitlements of the remaining Respondents. And, having exhausted their capacity to manufacture delays in the Court of Claims, Petitioners now attempt to protract a final judgment for Respondents by the initiation of Petitions for Writ of Certiorari in this Court.

Even if the pending Petitions are denied, as they were in 1974, we may be assured that Petitioners will be back again when judgment is final — or before that, if possible — in a further attempt to thwart justice for the Indians of the Reservation who are not members of the Hoopa Valley Tribe.

II.

The Manner in Which Petitioners Have Framed the Questions Presented to This Court Illustrate Their Bad Faith in These Proceedings.

The Hoopa Valley Tribe frames its first question for review as follows:

> "Whether individuals claiming to be 'Indians' have non-tribal ownership rights in the resources of an Indian reservation originally set aside for the resident tribe, where they are not members of the resident tribe, have never lived on the land so set aside, have never participated in tribal affairs, have as little as one sixty-fourth Indian blood, and where the Secretary of the Interior has previously rejected their claim to ownership rights."

A mere reading of the question elucidates the gross misrepresentations and false assumptions inherent in the inquiry.

1. It is not "individuals claiming to be 'Indians' " who have "non-tribal ownership rights in the resources of the reservation", but "Indians of the Reservation", a number of whose entitlements have already been determined by the Court of Claims.

2. The Court has specifically held that the Reservation was not originally set aside for the Hoopa Valley Tribe, or any particular tribe, and based this conclusion on an exhaustive review of the statute and executive orders which created the Reservation.

3. Respondents had no opportunity to be members of the resident tribe or participate in its tribal affairs. The Court has determined that the tribe's membership requirements were specifically devised to exclude from membership a majority of the Indians of the Reservation.

4. The overwhelming majority of the Respondents have a degree of Indian blood ranging from 100% to no less than one-eighth degree Indian blood, and a number of Respondents with one-half degree or more Indian blood have already been held entitled to recover in these proceedings. Whether or not Respondents with a lesser degree of Indian blood will be determined to be entitled is yet to be decided. However, the Hoopa Valley Tribe is in little position to complain whatever the result. In determining its initial membership, the tribe imposed no blood degree requirement on its first members. Further, in defining California Indians, Congress has twice defined the term without reference to any specific blood degree. 25 U.S.C. 651 and 25 U.S.C. 659.

The second question posed by the Hoopa Valley Tribe is no less false and misleading. It states:

> "Whether the heretofore inviolate concept of tribal ownership of the unallotted lands and resources of an

> Indian reservation — upon which the national policy of tribal self-determination is dependent — may be abrogated by a determination of the Court of Claims divesting a sovereign tribe of its exclusive ownership and political control of its reservation, and thereby effectively abolishing the tribe."

1. Even a casual reading of the decisions of the Court of Claims show that these decisions did not divest a sovereign tribe of its "exclusive ownership and political control of its reservation," because the Reservation in question was not established for any particular tribe or tribes, but for all Indians authorized by the President to share in the benefits of the Reservation.

What the Court of Claims has said in its decisions — and which grossly offends the Hoopa Valley Tribe — is that a small group of Indians cannot, three-quarters of a century after creation of the Reservation, establish a tribal entity with an exclusive and discriminatory membership, and thereby deprive a majority of the Indians of the Reservation of their equal shares in the revenue derived from sale of the unallotted trust resources of the Reservation. The Court of Claims has merely found that entitled Respondents shall receive a money judgment against the United States for funds which the United States misapplied by giving the money to members of the Hoopa Valley Tribe instead of to entitled Respondents.

2. Nothing in the decision of the Court of Claims abolishes the Hoopa Valley Tribe. The decision only compensates Respondents for money wrongfully taken from them by the United States as Trustee of the unallotted resources of the Hoopa Valley Reservation. The Hoopa Valley Tribe is not battling in these proceedings to preserve its tribal identity, but seeks from this court a license to steal from

the majority of the Indians of the Reservation upon whom the Tribe has declined to bestow membership.

The questions posed by the United States are almost as lacking in objectivity as are those framed by the Hoopa Valley Tribe.

In its first question, the United States refers to "the consistent action of the Executive and Congress treating the original portion of the Reservation as a unit distinct from the strip added to the reservation in 1891." This statement is, of course, in direct contradiction to the factual findings of the Court of Claims which determined that:

> "Administrative opinions, in the years following the executive order of 1891, recognized both that a number of tribes . . . were entitled to rights on the reservation and, with pointed relevance to the instant case, that the Indians of the Addition and the Square were equal in respect to rights in the lands of the Square. . . . (B12)
>
> "No contrary ruling worth the mention was made in the Department of the Interior until the Secretary in 1955 began to pay the income from the Square to the Hoopa Valley Tribe and the Deputy Solicitor in 1958 wrote an opinion justifying the legality of his action." (B12-13)

The Court specifically found that the Deputy Solicitor's opinion "does not reflect the facts found here." (B13)

The second question posed by the United States is completely irrelevant to the Decisions of the Court of Claims. It states:

> "Whether, in light of the long recognized authority of Indian tribes to establish their own standards for membership and the statutory authority of the Secretary to make such determinations where necessary, the Court of Claims erred in assuming the responsibility for determining which of the individual respondents are

> members of the Yurok Tribe — which traditionally occupied the strip added to the Reservation in 1891 — for purposes of determining whether they are entitled to benefit from revenues generated on the original Hoopa Valley Reservation."

The Court of Claims has made no effort to determine membership in a tribe. At the early insistence of the United States, the Court has had before it the cases of over 3,800 individual named Respondents whose individual rights to recover a money judgment against the United States are presented. It is the United States which has attempted to misrepresent this suit for a money judgment as a determination of tribal memberships.

III.

The Court of Claims' Decisions and the Award of Monetary Damages to Individual Plaintiffs Create No Conflict With the Traditional Concept of Communal Ownership of Land by Indians.

Petitioners further seek to mislead this court when they state:

> "In effect the Court of Claims has created a bastard, a novel kind of Indian property which is neither allotted nor tribal." (Petition of Hoopa Valley Tribe, pp. 23-24)

The same argument is stated in more moderate terms by the United States in its Petition at pages 15-16.

These assertions ignore the fact that the Court of Claims will merely award a money judgment to Respondents in compensation for funds improperly withheld from Respondents by the United States.

The decisions of the Court of Claims pose no threat to the historic concept that Indian property is communal property. The Court has itself defined the concept of Indian communal property, *Journeycake v. Cherokee Nation and the United States*, 28 Ct.Cl. 281, 302 (1893); and has further found that all tribal lands were held by the Indians as communal property. *Prairie Band of Potawatomi Indians v. United States*, 143 Ct.Cl. 131, 143 (1958).

It does not necessarily follow, however, that because all tribal lands were communal, all communal lands are also tribal. Such a conclusion is like arguing that because Egypt is in Africa and all Egyptians are Africans, all Africans are therefore Egyptians.

Reservations may be set apart for Indian tribes, individual Indians, or both. See for example, *Shoshone Tribe v. United States*, 299 U.S. 476, 485-486 (1937), where the court said:

> "The United States agreed that the territory described in the treaty now generally known as the Wind River Reservation, would be 'set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and for such other friendly tribes *or individual Indians* as from time to time they may be willing, with the consent of the United States, to admit amongst them' ". (Emphasis added)

When a recovery is strictly tribal, only members of the tribe may participate in the judgment. *Eastern Band of Cherokee Indians v. United States*, 177 U.S. 288, 308-312 (1885); *Eastern Cherokees v. United States*, 45 Ct.Cl. 229, 234-235 (1910).

On the other hand, where a judgment does not belong exclusively to a tribe, entitled individuals outside its ranks may participate in the recovery. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 82 (fn. 14) (1977). In the latter case, it is said:

> ". . . Cherokee Delawares eligible to share in the distribution must necessarily be members of the tribal entity as presently constituted. Absentee Delawares

> eligible to share in the award, on the other hand, are defined somewhat more broadly, so that some nonmembers of the tribe are eligible under the statute."

In the instant case, the Court of Claims found that the Hoopa Valley Reservation was established by statute and executive order for the accommodation of the Indians of California, and most particularly the Indians of Northern California. (B16) The Court of Claims has specifically described the unallotted lands of the Hoopa Valley Reservation as "communal lands". (B13)

The establishment of such reservations, without regard to tribal identity, was in keeping with the historic circumstances visited upon the Indians of California. After 1851 "the various bands and groups of Indians in (California) have not existed as distinct and recognizable tribes or bands of Indians as they had lived prior to 1848." *Clyde F. Thompson v. United States*, 122 Ct.Cl. 348, 356-357 (1952).

There is no reason in logic or law why communal lands of an Indian reservation may not be held in this traditional manner by all of the Indians of a reservation, as opposed to one or more tribal entities. The bestowal on each communal owner of an individual share of a monetary judgment does not conflict with the status of reservation lands as communal.

A monetary judgment award to the individual Respondents in these proceedings will accomplish no more than to vest the right of each successful Respondent in his *distributed share* of the judgment, and that portion of the judgment fund so allotted to him will be alienable and descendible. *Sizemore v. Brady*, 235 U.S. 441 (1914).

But such a judgment will not destroy the communal nature of a Respondent's continuing right in the unallotted trust assets of the Reservation, which interest will remain communal. The intent of the Court of Claims not to interfere with the communal concept is illustrated by the fact that the Court denied a motion for intervention in the suit by a number of descendants of the present Respondents, whose participation would have been automatic if Respondents' rights were descendible.

Finally, nothing in a monetary award of damages to successful Respondents would cause the liquidation of the resources of the Hoopa Valley Reservation. The United States will retain its status as Trustee after any judgment, and can manage the resources on such conditions as it finds necessary to protect the trust beneficiaries, the Indians of the Reservation. There is ample law upholding the Government's powers as Trustee. See for example *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 687 (1976).

IV.

Nothing in the Award of a Money Judgment to Respondents Will Result in a Termination of the Hoopa Valley Tribe.

The Hoopa Valley Tribe does not, in truth fear its termination as a tribe, but seeks to continue to bestow upon its members money which properly belongs to other Indians, the Respondents.

In its Petition, the Tribe bemoans:

> "Removal of the economic base of the Hoopa Valley Tribe will clearly lead to economic termination of the tribe. Political termination will follow when 3,800 new non-tribal owners observe that they have an overwhelming majority voice. In light of the refusal of Plaintiffs to organize as an Indian tribe, a final expectable consequence will be their seeking sale of all reservation assets for one final large individual payment." (Petition, pp. 18-19)

> "For the tribe, divestiture of its lands, resources and revenues will effectively 'terminate' the tribe and render it little more than a 'private, voluntary organization'." (Petition, p. 16)

The Court of Claims has determined that since 1955, the United States has paid to the Hoopa Valley Tribe and its members not only the share of revenue from the unallotted trust resources of the Reservation to which the members of the tribe are entitled, but Respondents' share as well. The only termination to result from these proceedings will be a termination by the Tribe of a taking of money which does not belong to it. Far from seeking justice, the Hoopa Valley Tribe stands before this court pleading that it should be permitted in perpetuity to take money which belongs to other Indians. The right of the tribe to maintain its tribal status is not at issue. Nor is its right to a fair share of the revenue derived from the sale of the unallotted trust resources of the Reservation. Respondents lack the authority, even if they had the desire, to sell off the unallotted trust resources of the Reservation. Control of these resources lies in the hands of the Trustee, the United States.

The groundless assertions of the Hoopa Valley Tribe with regard to "termination" are so patently specious, that even the United States, in its Petition, admits the absurdity of such contentions, stating:

> "It may be argued that, in its 1981 Decision, the Court of Claims determined that individual 'Indians of the Reservation' actually have an individualized interest in the resources of the reservation. . . .
>
> "We do not believe the opinion should be read in this fashion. While the Court of Claims' decisions require per capita payments to all 'Indians of the Reservation,' they appear to do so only because similar payments already have been made to members of the Hoopa

> Valley Tribe, and the Court of Claims is attempting to treat the other Indians on the Reservation on an equal basis." (Petition, p. 27, fn. 17)

The Hoopa Valley Tribe also argues that a money judgment for Respondents will amount to a determination "to terminate Indian rights". (Petition, p. 19)

Such argument is deliberate nonsense. This case is not a contest between Indians, on the one hand, and non-Indians, on the other. The Court of Claims has merely held that the Indians who elected to organize as the Hoopa Valley Tribe do not have a right, by virtue of their 1950 tribal organization, to deny to other Indians of the Reservation an equal share in the revenue derived from the sale of the Reservation's trust assets. This is a far cry from a termination of Indian rights.

V.

The Court of Claims' Decisions Pose No Threat to Other Indian Reservations Throughout the United States.

At pages 26-28 of its Petition, the Hoopa Valley Tribe argues that "the Court of Claims' Decision threatens at least 68 reservations throughout the United States. These reservations are listed in Appendix F to the Tribe's Petition for Writ of Certiorari. When duplications on the list are eliminated, the number of reservations cited in Appendix F is 66, rather than 68.

Based upon a comprehensive analysis of the statute, executive orders and administrative history pertaining to the Hoopa Valley Reservation, the Court of Claims has decided that Respondents are entitled to a money judgment against the United States because Respondents were improperly denied a share in the proceeds from sale of unallotted trust assets of the Reservation.

Each of the 66 reservations listed in Appendix F was established under different statutes and regulations than those which the court interpreted in the instant case. Each of these 66 reservations has a different history. No showing has been offered that conditions exist on any of these reservations comparable to those prevailing on the Hoopa Valley Reservation and which resulted in the decision of the Court of Claims.

In the eight years since the Court's 1973 decision, no comparable cases have been initiated with regard to any of these 66 reservations. If such a case should be initiated, it would have to be decided on the basis of the statutes, administrative orders and historical treatment of the affected reservation.

The Hoopa Valley Tribe's claim of widespread danger from the Court's 1973 decision is merely another specious argument advanced by the Tribe in an effort to secure a judicial approval of the government's policy of taking money belonging to other Indians and misapplying those proceeds for the benefit of the Tribe and its members.

VI.

The Court of Claims' Decisions Do Not Interfere in Questions Reserved to the Political Branches of the Government.

Respondents have never asked the court to determine tribal membership, or to do anything except give Respondents the monetary judgment to which they are entitled.

Petitioners, on the other hand, have repeatedly, although unsuccessfully, attempted to lead the court into considerations beyond its jurisdiction.

In its Petition, the United States again attempts to introduce issues which are not before the court, stating:

> ". . . The fundamental relationship of this suit to the resources of the Reservation gave rise to serious Reservation management questions, pertaining to fishing on the Klamath and Trinity Rivers, allotment of individual land holdings, on-Reservation industry, commerce and employment, and access of individuals and tribes to federal program assistance." (Petition, p. 13)

None of these issues have been before the court, and the court has not attempted to intrude into any of them.

The court's jurisdiction over Respondents' claim to an award of monetary damages is grounded upon 28 U.S.C. 1491, under which individual Indians may prosecute their claims, as may any other citizen.

The political branches of government have long since spoken with regard to the creation, organization, and bestowal of rights on the Hoopa Valley Reservation. The Reservation was created pursuant to a specific act of Congress, and by two Presidential executive orders. The decision as to which of the Respondents are Indians of the Reservation, for purposes of recovering a money judgment against the United States, constitutes the performance of the traditional function of judicial statutory interpretation. Congress and the Executive Branch have already provided the references by which entitlement can be determined.

The United States in its Petition argues that "the Court of Claims should not be attempting to determine who are 'Indians of the Reservation,' which determination is tantamount to determining the membership of the Yurok Tribe." (Petition, pages 24-25)

Respondents have, however, overwhelmingly voted their rejection of the government's effort to organize them as a tribe. Even if the United States could create some new tribal entity, it would have no retrospective vitality, and the court would still be required to determine which of the Respondents have a right to recover as Indians of the Reservation for the period involved in the government's past wrong, a period during which the court has specifically found that there was on the Hoopa Valley Reservation no organized tribe representing the interests of the Respondents.

To deny the court the opportunity to determine which of Respondents are Indians of the Reservation would shear from Respondents all judicial redress for the past betrayal by the United States of its stewardship.

VII.

Petitioners Misinterpret the Legislative Intent in the 1964 Amendment of 25 U.S.C. 407.

Petitioners, as they have in the past, continue to argue that the 1964 amendment of 25 U.S.C. 407 somehow validates their denial to Respondents of a share of the proceeds from the Reservation's timber resources.

Prior to 1964, 25 U.S.C. 407 directed that timber on unallotted reservation lands may be sold and the proceeds "used for the benefit of the Indians of the Reservation in such manner as (the Secretary of the Interior) may direct." In 1964 the statute was amended to substitute the term "Indians who are members of the tribe or tribes concerned" for the term "Indians of the Reservation".

A review of the legislative history of this amendment to 25 U.S.C. 407 reveals that the statutory modification was not designed to limit distribution of timber proceeds to tribes as opposed to Indians of the Reservation. The term "Indians of the Reservation" in the statute had been interpreted to require distribution only to Indians resident on the reservation. The term "members of the tribe or tribes concerned" was substituted in order to accommodate use of revenues derived from timber sales "for the benefit of tribal members rather than, as under present law, only those who live on the reservation concerned." U.S. Code, Congressional and Administrative News, Volume 1, 88th Congress, Second Session, 1964 Laws and Legislative History, pages 2162-2163, quoting House Report No. 1292, with regard to the amendment.

Considered in context, it is clear that the amendment of 25 U.S.C. 407 was in no way directed to the issue presented in these proceedings. On the contrary, the amendment accomplished a redefinition of terms for the purpose of expanding the number of Indians eligible to receive benefits from the sale of unallotted trust resources of the various reservations.

Neither the pre-1964 nor post 1964 version of the statute can be read to justify a discriminatory and unjust distribution of revenues by the trustee United States, whose duty is to all Indians, not merely to the members of a single tribe.

VIII.

Petitioners Have Demonstrated No Conflict Between the Decision of the Court of Claims in the Instant Case and the Decision of the United States Court of Appeals for the Ninth Circuit in *Blake v. Arnett*.

The instant case deals with rights of all Indians of the Reservation to share equally in the proceeds of the unallotted trust resources of the Reservation.

Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981), deals with an entirely different question: the right of Yurok Indians to cross non-Indian lands on a part of the Hoopa Valley Reservation for fishing purposes. In *Blake*, the court determined that the Indian Plaintiffs did not retain communal hunting and fishing rights on private lands, but left open the question as to the Hoopa Indians whose interests the court determined could not be represented as a class by the Yurok Plaintiffs.

Nothing in *Blake* even remotely contradicts the decision of the Court of Claims requiring equality of treatment of all Indians of the Reservation in the unallotted trust resources of the Reservation.

IX.

No Necessity Has Been Demonstrated for Briefs of Amici Curiae and the Motions for Leave to File Such Briefs Should Be Denied.

A motion to allow the filing of an amicus brief must "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties." Rules of the Supreme Court, Rule 36.3.

If consent of a party has been refused, a motion to file the brief of an amicus curiae is not favored. Rules of the Supreme Court, Rule 36.1.

In the instant case, the organizations seeking leave to file briefs of amici curiae have set forth identical facts and questions of law as those proposed by Petitioners. The makers of the motions have stated no reasons for believing that their views will not be adequately represented in these proceedings by the United States and the Hoopa Valley Tribe.

Far from assisting the court in resolving the issues in the instant case, the moving parties have indicated that they, themselves, do not understand the issues before the court. For instance, the Quinault Indian Nation states at page 4 of its Statement:

> "The Court of Claims held that a class of people, including *many non-Indians*, hold 'aliquot' shares or 'equal rights in common' to tribal lands of the Hoopa Square of the Hoopa Valley Reservation." (Emphasis added)

It would be hard to conceive a statement more grotesquely misquoting the holding of the Court of Claims, which provided for a recovery only by those who could establish that they were Indians of the Reservation.

The Quinault Indian Nation further states:

> ". . . The decision of the Court of Claims determines that individuals hold interests in proceeds of tribal lands, and therefore in the tribal land themselves." (at page 7)

On the contrary, the Court of Claims held that the lands of the Hoopa Valley Reservation were not tribal lands, but in fact belonged equally to all Indians of the Reservation regardless of tribal membership.

The motion filed by the National Congress of American Indians, *et al.* displays an equal lack of understanding of the court's decision. The motion seeks to refute the Court of Claims by asserting:

> "Unallotted property is not owned by individual tribal members, let alone non-members, as tenants in common."

As set forth *supra,* the Court of Claims made no decision that the unallotted lands of the Reservation are held by Indians as tenants in common. On the contrary, the court has specifically found that the lands are held in the traditional communal form of Indian title.

Consequently, even if the Petitions for Writ of Certiorari are granted, no benefit would accrue to the Court by the introduction of flights of fancy by amici into speculative areas not presented by the decisions of the Court of Claims.

Therefore, Respondents respectfully request that the motions for leave to file briefs of amici curiae be denied.

X.
Conclusion.

For the reasons set forth above and each of them, it is respectfully requested that the Petitions for Writ of Certiorari be denied. These Petitions merely seek to relitigate matters which have been repeatedly disposed of by the courts in the same manner for a period of 19 years. This court denied Petitions for Writ of Certiorari in 1974, and no new issue is today presented which would cause the court to reverse the manner in which it has already exercised its discretion.

These proceedings have been unreasonably protracted by the deliberate tactics of Petitioners who seek to perpetuate the injustices they have heaped on Respondents since 1955. It is time to lay finally at rest issues which have long since been decided, and permit the case to go to final judgment in the Court of Claims.

Dated: March 17, 1982.

Respectfully submitted,
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Opposition

2

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Nos. 81-1371
81-1373

In the Supreme Court
OF THE
United States

October Term, 1981

United States of America and the Hoopa Valley Tribe,
Petitioners,

vs.

Jessie Short, et al.,
Respondents.

OPPOSING BRIEF

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QUESTIONS PRESENTED

Both petitioners grossly misrepresent the questions presented by assuming facts that are contrary to the findings of the Court of Claims.

The United States incorrectly asserts that the Court of Claims is assuming the responsibility for determining which of the individual respondents are members of the Yurok Tribe. The Court of Claims held that the Hoopa Valley Reservation was established pursuant to the Act of April 8, 1864 for such Indians of California who settled there, that it was not set aside for any particular tribes, and that rights to the Reservation's benefits inured to individuals by reason of their personal connection with the Reservation, not by virtue of their membership in any tribe. The Court of Claims further held that those respondents who proved that they had such personal connection as to be Indians of the Hoopa Valley Reservation—not through membership in the Yurok or any other tribe—would be entitled to share in the money judgment. No question of standards for membership in the Yurok Tribe is being considered by the Court of Claims nor is presented here for review.

The Hoopa Valley Tribe's statement of the questions presented is shot through with contentions rejected as a matter of fact by the Court of Claims, and most particularly, with the false assumptions that (a) the Hoopa Valley Reservation was set aside for "the resident tribe" or any tribe, (b) that respondents have never lived on the Reservation and have tenuous connections to it, and (c) that a "sovereign tribe" has been "divested" of "exclusive ownership and political control of its reservation."

The *real* questions presented by the decisions of the Court of Claims follow.

Was the Court of Claims correct in holding that:

(1) The Hoopa Valley Indian Reservation, created and enlarged by Executive Orders validly issued in furtherance of and pursuant to the Act of Congress of April 8, 1864, 13 Stat. 39, providing for the establishment of not more than four reservations to accommodate all of the Indians of California, constitutes a single reservation held in trust by the United States for the equal benefit of all California Indians accommodated thereon.

(2) The sequence in which individuals of various Indian ethnic heritage occupied the Hoopa Valley Reservation gave no vested or preferential rights to those persons settled there first; all Indians of the Hoopa Valley Reservation are entitled to share equally in the income generated from the communal (non-allotted) reservation lands, and no group of Hoopa Valley Reservation Indians has superior rights to any other group of Hoopa Valley Reservation Indians to that income;

(3) The Secretary of the Interior acted in violation of the statute authorizing creation of the Hoopa Valley Reservation and the executive orders defining its boundaries, and contrary to past practice of the Interior Department in the management of the Reservation by distributing the income from the unallotted lands of the Reservation exclusively for the benefit of the members of the group organized in 1950 known as the Hoopa Valley Tribe—an organization that did not even purport to represent all of the Indians of the Reservation—and in refusing to share those distributions of income with the other Indians of the Reservation.

TABLE OF CONTENTS

Page

Questions presented i

Table of contents iii

Table of authorities v

Opinions below 1

Statement of the case 2

- A. Summary of major proceedings 2
- B. The creation, enlargement, and administration of the Hoopa Valley Reservation 4
- C. Organization of the Hoopa Valley Tribe 10
- D. Respondents and their claim 12

Reasons why the writ should be denied 14

- A. The decisions of the Court of Claims are not in conflict with a decision of this or any other court 14
- B. The decisions of the Court of Claims turn on the facts of this case and will have no impact beyond the Hoopa Valley Reservation 17
- C. Nothing has occurred in this case to warrant the court granting certiorari now when it denied certiorari eight years ago on the same issues 20
- D. The reasons petitioners proffer for granting the writ are all specious 22
  - 1. The decisions of the Court of Claims involve no question of unlawful termination of the Hoopa Valley Tribe 22
  - 2. The Court of Claims has not created a novel kind of Indian property as the Hoopa Valley Tribe contends 24

TABLE OF CONTENTS

Page

3. The timber statute referred to by petitioners gives the Department of the Interior no power to withhold distributions of timber income from Indians entitled to that income 26

4. The Court of Claims has not arrogated to itself a question reserved to the political branches 27

Conclusion 29

Appendix (bound separately)

TABLE OF AUTHORITIES

Cases

Page

Arenas v. United States, 322 U.S. 419 (1944) 22

Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981) 14-16

Cherokee Nation v. United States, 40 Ct. Cl. 252 (1905), aff'd 202 U.S. 101 (1906) 25, 26

Chippewa Indians of Minnesota v. United States, 301 U.S. 358 (1937) 19

The Crow Nation v. United States, 81 Ct. Cl. 238 (1935) 19

Donnelly v. United States, 228 U.S. 243 (1913) 8

Halbert v. United States, 283 U.S. 753 (1931) 19

Hoopa Valley Tribe v. United States, 596 F.2d 435 (Ct. Cl. 1979) 2, 3, 21

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 19, 28

Indians of California v. United States, 98 Ct. Cl. 583 (1942) 4

Joseph's Band v. United States, 95 Ct. Cl. 11 (1941).... 19

Luckenbach S.S. Co. v. United States, 272 U.S. 533 (1926) 19

Mattz v. Arnett, 412 U.S. 481 (1973) 5, 8, 14, 16, 17

McGhee v. Creek Nation, 122 Ct. Cl. 380, cert. denied, 344 U.S. 856 (1952) 25, 26

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) 18

Quinaielt Tribe v. United States, 102 Ct. Cl. 822 (1945) 19

Short v. United States, 202 Ct. Cl. 870, 486 F.2d 561, cert. denied sub. nom. Hoopa Valley Tribe v. Short, 416 U.S. 961, reh. denied, 417 U.S. 959 (1974) ....passim

TABLE OF AUTHORITIES

CASES

Page

Shoshone Tribe v. United States, 299 U.S. 476 (1937) 19

United States v. Choctaw Nation, 179 U.S. 494 (1900) 19

United States v. Esnault-Pelterie, 303 U.S. 26 (1938) 19

United States v. Jim, 409 U.S. 80 (1972) 19

Statutes

Act of April 8, 1864, Chap. 48, 13 Stat. 39 ....passim

Act of June 25, 1910, Chap. 431, § 7, 36 Stat. 857 and as amended April 30, 1964, Pub. L. 88-301, 78 Stat. 186, codified at 25 U.S.C. § 407 26-27

California Rancheria Termination Act:
  Act of August 18, 1958, Pub. L. 85-671, 72 Stat. 619, as amended by Act of August 11, 1964, Pub. L. 88-419, 78 Stat. 390 (not codified) 22

Klamath Tribe Termination Act:
  25 U.S.C. §§ 564-564x 22

Western Oregon Termination Act:
  25 U.S.C. §§ 691-708 22

Orders

Executive Order of June 23, 1876, I Kapp. 815 ....passim

Executive Order of October 16, 1891, 1 Kapp. 815 ......passim

Other Authorities

H.R. No. 1292, 88th Cong., 2nd Session (1964), reprinted in 1964 U.S. Code Cong. & Ad. News pp. 2162-5 27

Nos. 81-1371
81-1373

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA and the HOOPA VALLEY TRIBE,
Petitioners,

vs.

JESSIE SHORT, et al.,
Respondents.

OPPOSING BRIEF

OPINIONS BELOW

The opinion of the Court of Claims of September 23, 1981 (A)[1] is reported at 661 F.2d 150. The original judgment on liability of October 17, 1973 (B) is reported at 202 Ct. Cl. 870; that judgment with the findings of fact omitted is reported at 486 F.2d 561. This Court's denial of certiorari regarding that 1973 decision is reported at

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[1] Letter reference "A" is to the September 1981 opinion of the Court of Claims in *Short v. United States* which is reproduced as Appendix A to the Petition for Writ of Certiorari filed by the Hoopa Valley Tribe. Letter reference "B" is to the October 1973 opinion which is reproduced as Appendix B to the Hoopa Valley Tribe's Petition for Certiorari. Letter reference "I" is to the 1979 judgment of the Court of Claims in *Hoopa Valley Tribe v. United States* which is reproduced as Appendix I to this Opposing Brief.

416 U.S. 961, and denial of the petition for rehearing is at 417 U.S. 959.

The 1979 judgment of the Court of Claims dismissing the related case of *Hoopa Valley Tribe v. United States* is reported at 596 F.2d 435 and is reproduced in the Appendix to the Opposing Brief and labelled "I".

STATEMENT OF THE CASE

A. Summary of Major Proceedings.

On October 17, 1973 the Court of Claims sitting *en banc* rendered a unanimous decision that the United States was liable to respondents for its failure since 1955 to distribute to them their proportionate share of the income generated from the unallotted, communal lands of the Hoopa Valley Reservation. The basis for that decision was that the Department of the Interior was in error in treating the area originally set aside as the Hoopa Valley Reservation ("The Square") and the area added to the reservation by executive order in 1891 ("The Addition") as separate reservations in which the Indians of each had exclusive rights to the resources of their area (B13). The Court held that the Square and the Addition together constituted a single reservation, that all the Indians of that Reservation were entitled to share in all of the Reservation's revenues that were distributed for the benefit of individual Indians (including the timber revenues from the Square), and that those respondents who were Indians of the Reservation were entitled to recover the monies the Government withheld from them (Fdg. 189, B105). The United States and the Hoopa Valley Tribe petitioned for certiorari to review that decision, and certiorari was denied (416 U.S. 961). Rehearing was denied at 417 U.S. 959.

Subsequently the Hoopa Valley Tribe filed suit in the United States District Court for Northern California in an effort to relitigate these same issues. The District Court transferred the case to the Court of Claims, and the Court of Claims dismissed the action as having been precluded by the 1973 judgment in *Jessie Short* (I-3).

After the dismissal of that case, the United States and the Hoopa Valley Tribe filed motions whose denial in the 1981 decision of the Court of Claims is the occasion for the present petitions for certiorari. The United States filed a motion to substitute a non-existent entity it denominated "the Yurok Tribe" as the party plaintiff in place of the individual plaintiffs, and the Hoopa Valley Tribe filed a motion to dismiss the case as non-justiciable, contending (as it had asserted in its 1973 petition for certiorari) that the issues presented a political question. The Court of Claims, again sitting *en banc,* and again acting unanimously, denied both motions, noting that the contentions presented had been rejected "repeatedly" (A11).

Neither petition for certiorari addresses the Court of Claims's denial of the motion to substitute "the Yurok Tribe." The questions presented for review by both petitioners concern the liability decision rendered in 1973, reiterated in that court's 1979 dismissal of *Hoopa Valley Tribe v. United States,* and confirmed again by the Court of Claims in its 1981 decision.

B. The Creation, Enlargement, and Administration of the Hoopa Valley Reservation.

The findings of fact incorporated in the 1973 decision of the Court of Claims meticulously trace the history of the creation and enlargement of the Hoopa Valley Reservation. Before the Reservation was established, Congress had sought to provide reservation accommodations for the Indians of California in two other ways. First, as it had done elsewhere in the nation, Congress appointed Commissioners to negotiate for treaty reservations for particular tribes. Eighteen such treaties were negotiated with the California Indians, one of which provided for a joint reservation for Indians of Hupa,[2] Yurok, and Karok ancestry which would have encompassed much of the same area as ultimately became the Hoopa Valley Reservation (Fdg. 18(e), B25). The plan was abandoned when the Senate failed to ratify any of these treaties (see *Indians of California v. United States,* 98 Ct. Cl. 583 (1942)).

Next, Congress dealt temporarily with the California Indians by establishing military reservations for as many of them as possible. This was how the Klamath River Reservation, consisting of a two-mile wide strip of territory along the Klamath River from the Pacific Ocean extending twenty miles inland (Fdg. 1, B14), was established. The statutes which allowed for the creation of this military reservation did not set it aside for any particular tribe or ethnic group of Indians. The statutes provided, instead, for the selection of reservations for collecting and providing subsistence for "the Indians of California." *Mattz v. Arnett*, 412 U.S. 481, 487 (1973). As a consequence, Indians of various ethnic backgrounds were placed on the Klamath River Reservation (Fdg. 7, B15).

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[2] "Hupa" is used to denote Indians of Hupa or Hoopa ethnic background to avoid the mistaken impression that the Hoopa Valley Tribe is composed only of persons predominately of Hupa blood (see Fdg. 4, B15).

In 1864 Congress acted to provide permanent reservations for the Indians of California by authorizing the President to establish not more than four reservations, as remote from white settlements as possible, adequate "for the accommodation of the Indians of said State" (Act of April 8, 1864, Chap. 48, 13 Stat. 39) (Fdg. 10, B16-17).

Pursuant to that Act Austin Wiley, the Superintendent of Indian Affairs for California, posted a public notice in August 1864 of the establishment of a reservation in Klamath County, California. The reservation as proposed at that time would have been limited to the Hoopa Valley "to the summit of the mountains on each side"—an area half the size as was later set aside as the original area of the Reservation. In informing the Commissioner of this notice and his proposal, Wiley also reported that he had negotiated a "treaty" with certain of the younger Indians—the "treaty" that the Hoopa Valley Tribe discusses at great length in its Petition for Certiorari (pp. 3-6). The Commissioner advised Wiley that the United States did not intend to deal with the Indians of California by treaties to be submitted to the Senate for confirmation (and this "treaty" never was submitted or confirmed), but that in order to commit the Indians Wiley should present them with a document to sign—a document drawn up by the Interior Department with additions to the original "treaty" (Fdg. 16, B22-23). There is no evidence that this "treaty" was ever signed by any Indians or that the additions made by the Interior Department were ever made known to any Indians or approved by them (Fdg. 17, B23-24). Moreover, except for a notice posted by Wiley on February 8, 1865 stating the treaty stipulations were "confirmed", there is no indication that any further attention was ever paid to this document until it was dredged up by counsel for the Hoopa Valley Tribe at the trial of this case (Fdg. 17, B24).[3]

On February 18, 1865, Superintendent Wiley issued a second public notice which defined the boundaries of the Hoopa Valley Reservation as a tract of land twelve miles square bisected by the lower twelve miles of the Trinity River. The reservation as thus proposed by Wiley and as eventually formally defined by Executive Order in 1876 was twice as large as originally proposed by Wiley in his "treaty" (Fdg. 21, B25-27). This extension of the reservation six miles further down the Trinity River beyond the Hoopa Valley encompassed traditional villages of Indians of Yurok descent (Fdgs. 5, 21, 22, 179; B15, 25-27, 100). Thus, the Hoopa Valley Reservation as defined by

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[3] The Court of Claims considered the Hoopa Valley Tribe's claim that this 1864 "treaty" vested certain ethnic groups of Indians with exclusive rights to the area of the Hoopa Valley Reservation as originally established and rejected it outright—both as a matter of fact and as a matter of law (B7-8; Fdgs. 15-20, B19-25).

Wiley in 1865 was occupied by Indians of both Hupa and Yurok ethnic backgrounds.

Neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian tribe by name nor suggested which tribes were occupying or were to occupy the Reservation. This was to be expected since the statute whose authority was being exercised (the Act of April, 1864) said only that the four reservations were to be set apart to accommodate the Indians of California, not any particular tribes. The necessities of Indian policy in California also required that the reservations not be set aside for any particular tribes. There were many small and unorganized Indian "tribes" in California (B6; Fdg. 4, B15). To accommodate all the Indians of California on only four reservations, it would be necessary to place Indians of numerous ethnic groups on each one. And that is precisely what the United States did with the Hoopa Valley Reservation (Fdgs. 25, 28(a), B27, 28).

Despite the vast acreage of the Hoopa Valley Reservation as originally established, most of it was unsuitable for Indian homesites.[4] Thus in 1891, in order to accommodate on this reservation the numerous Indians living nearby, President Harrison enlarged the reservation by Executive Order to include a strip one mile on each side of the Klamath River from the then northern boundary of the reservation at the junction of the Klamath and the Trinity to the Pacific Ocean (Fdg. 33, B30). The lower twenty miles of this narrow strip comprised the old Klamath River Reservation (whose creation was discussed above at pp. 4-5). The intervening strip of land along the Klamath River added to the Hoopa Valley Reservation by the Executive Order of 1891, often referred to as the Connecting Strip, had never theretofore constituted reservation land (Fdgs. 1-9 and 34, B14-16 and 30-31). The following year by the Act of June 17, 1892 (27 Stat. 52) the portion of this Addition to the Hoopa Valley Reservation which had formally constituted the old Klamath River Reservation was opened for public settlement subject to the prior allotment of homesites and the reservation of village sites for the Indians inhabiting that portion of the Hoopa Valley Reservation (Fdg. 77, B51-52). This Court has reviewed this part of the history of the Hoopa Valley Reservation on two previous occasions. *Donnelly v. United States*, 228 U.S. 243 (1913) established that the 1891 Addition to the Hoopa Valley Reservation was lawfully made by the President pursuant to the authority granted by the Act of April 8, 1864. *Mattz v. Arnett*, 412 U.S. 481 (1973) determined that the Act of June 17, 1892 by opening for settlement the portion of the Addition which had once been the Klamath River Reservation did not have the effect of terminating the status of that area as part of the Hoopa Valley Reservation and that the entire Addition remains part of the Hoopa Valley Reservation.

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[4] About 86,000 acres of the 89,572 acres in the original portion of the Hoopa Valley Reservation were not suitable for homesites and were largely timberlands (Fdgs. 87, 90; B58-59, 61).

Both petitioners contend that by his 1891 Executive Order the President intended to circumvent the clear restrictions of the Act of 1864 limiting the number of Indian Reservations in California to four, by "technically" joining this addition to the original reservation (U.S. Pet. for Cert., pp. 17-21; HVT Pet. for Cert., pp. 6-8). This is a contention squarely faced and rejected by the Court of Claims:

> "Although the purpose of the executive branch in enlarging the reservation would seem to be apparent from the facts, the [United States] reaches a different result entirely; it contends that the purpose of the executive order was to join the parts of the enlarged reservation only technically, for administrative purposes only, the Indians of each tract to retain their rights in their respective tracts. No hint of such a purpose appears on the face of the executive order. And no support for such purpose appears in the data said by [the United States] to prove it—the background and origins of the executive order and of legislation affecting the Klamath River Reservation, a part of the Addition. An exhaustive inquiry into the data, set out in detail in the accompanying findings, fails to reveal even a mention of such a purpose as defendant asserts, much less the compelling showing which would be required to curtail the ordinary consequence of the executive order." (B11).

The Court of Claims relied also on administrative actions occurring after the Reservation was enlarged in 1891 to reach its conclusion that the Hoopa Valley Reservation as enlarged was intended to be one integrated Reservation. The Court exhaustively reviewed the history of the nearly annual census rolls of the Reservation's population and of the allotment processes on the Reservation and quoted verbatim from administrative rulings—all of which mandated the court's conclusions (B12; Fdgs. 101-108, B67-76).

The court also considered the 1958 ruling of the Interior Department relied on by the Hoopa Valley Tribe (HVT Pet. for Cert., pp. 11-12). This opinion was not rendered in any administrative proceeding after notice and hearing. It was nothing but an opinion written by "house counsel" for the Department of the Interior in an attempt to justify action already taken. The Court of Claims found that this opinion does not reflect the facts found by the court, contains both errors of commission and omission (Fdg. 174, B98), and lacks a "rational theoretical basis" (B13).

C. Organization of the Hoopa Valley Tribe.

The Court of Claims rejected as a matter of fact the Hoopa Valley Tribe's contention that it was a "tribe immemorial." Instead, the court found that the Hoopa Valley Tribe "was created in 1950, not long before the first distribution of timber revenues" (I-13, summarizing Fdgs. 136-156, B85-92).

Historically the various ethnic tribes represented by Indians who settled on the Hoopa Valley Reservation had never been politically organized (Fdg. 109, B76-77). Until 1915 the Indians who settled on the Reservation did not participate in its administration (Fdg. 109, B77). For a brief period in 1915-16 the Reservation Superintendent convened an ad hoc council of Indians to review applications for enrollment (Fdg. 110, B77).

From 1933 until 1950, there functioned on the Reservation a governmental body known as the Hoopa Business Council. The seven members of this council were all Indians drawn from the Hoopa Valley proper and the immediately adjacent Bald Hills area since difficult travel conditions made it impracticable for Indians residing in other areas of the Reservation to attend regularly. Indians of various ancestries were represented in the council membership and the council acted in respect to matters arising on and affecting all portions of the Reservation (Fdgs. 126-131, B82-84).

When the Hoopa Valley Tribe was formed in 1950, its membership was primarily comprised of persons who received allotments on the Square or who were descended from Square allottees (Fdgs. 140-144, B86-87). Allotments had been made only on a very small portion of the Square (3,600 acres of the total 89,562 acres) (Fdgs. 87, 90; B58-59, 61). Thus, the original membership was limited to individuals with ties to the Hoopa Valley and adjacent Bald Hills area. However, membership was and is by no means limited to persons of Hupa ancestry; persons of diverse Indian ethnic ancestry belong to the organization.

The timberlands which comprised the 86,000 acres of the Square not allotted had been used continually by Indians of all parts of the Reservation for hunting, fishing, and gathering basket materials (Fdg. 35, B31). Nevertheless those Indians with homes on the Addition who had used the communal lands of the Square were excluded from membership. Receipt of an allotment on the Addition or descent from an Addition allottee was not a criterion for membership. This exclusion of Indians of the Addition was deliberate (Fdg. 136, B85). By excluding the Indians of the Addition, the organizers of the Hoopa Valley Tribe chose to represent only the minority of the population of the entire Hoopa Valley Reservation.[5]

D. Respondents and Their Claim.

Respondents are 3,742 Indians excluded from membership in the Hoopa Valley Tribe who claim strong personal or ancestral ties with the Hoopa Valley Reservation as its boundaries were enlarged in 1891. Most of the respondents have themselves received allotments of land on the Reservation, have been listed on census rolls of the Reservation, and/or are descended from Indians who received allotments or who were listed on Reservation census rolls. Respondents, like the members of the Hoopa Valley Tribe, are of diverse Indian ethnic ancestry. Many of the respondents are spouses, children, grandchildren, parents or grandparents of members of the Hoopa Valley Tribe. In response to motions now pending in the Court of Claims, even the United States and the Hoopa Valley Tribe concede that at least 1,659 of these respondents would have been eligible for membership in the Hoopa Valley Tribe had those membership standards been applied to Indians of the *entire* Reservation and not just to Indians with ties to the Square part of the Reservation.[6]

---

[5] During the time census rolls were compiled on the Reservation which distinguished between those Indians living on the Square and those on the Addition, those on the Addition outnumbered those on the Square by nearly two to one (e.g., Fdg. 92, B62). The most recent census rolls of the Reservation prior to the organization of the Hoopa Valley Tribe in 1950 did not separate the Indians into different lists, but instead listed all the Indians of the Reservation, including nearly all the respondents then alive, on a single alphabetical roll (Fdg. 48, B34).

Respondents filed suit in 1963 to challenge the Department of Interior's action in excluding them from distributions of income that had been generated from the unallotted lands of the Hoopa Valley Reservation, primarily from sales of timber. Beginning in 1955 and continuing to 1974 the Secretary of the Interior each year disbursed all of this income exclusively to or for the benefit of the Indians who were members of the group organized in 1950 under the name of the Hoopa Valley Tribe. Since 1974 the Secretary of the Interior has limited its distributions to or for the benefit of the members of the Hoopa Valley Tribe to thirty percent (30%) of the total revenues. The Secretary holds the remaining 70% of the income in an escrow account pending final judgment in this case.[7]

Respondents contended that the United States's distribution of Reservation income only to the members of the Hoopa Valley Tribe to the exclusion of all other Indians of the Reservation violated the statute and executive orders establishing the Reservation as well as a theretofore consistent administrative policy treating the enlarged reservation as a single, integrated reservation where no Indian had superior rights to any other Indian of the Reservation.

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[6] In that same motion respondents contend that 3,302 respondents would have been eligible. Judgments of entitlement have already been entered on behalf of 142 respondents not subject to those pending motions.

[7] The thirty percent (30%) figure derives from the fact that if all respondents were deemed eligible to share in the reservation income with all members of the Hoopa Valley Tribe, the relative proportions of those entitled to share would be thirty percent (30%) members of the Hoopa Valley Tribe and seventy percent (70%) respondents.

The Court of Claims emphatically agreed with respondents:

> "[T]he effect of the executive order of 1891 was that all the Indians of the Reservation as thereby extended—Addition and Square—got equal rights in the enlarged reservation and thus that the rights of Indians of the Addition are equal to those of Indians of the Square, the Hoopa Valley Tribe or any other Indians of the Reservation.
>
> It follows that [the United States] acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands of the Square. Such of the plaintiffs as are found herein to be Indians of the reservation will become entitled to share in the income from the entire reservation, including the Square, equally with all other such Indians, including the Indians of the Square." (Fdgs. 188-189, B105).

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Decisions of the Court of Claims Are Not in Conflict with a Decision of This or Any Other Court.

The Hoopa Valley Tribe contends that the decisions of the Court of Claims are in conflict with a recent decision of the Ninth Circuit in *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981) (HVT Pet. for Cert. p. 30) and suggests that they are inconsistent with this court's decision in *Mattz v. Arnett*, 412 U.S. 481 (1973) (HVT Pet. for Cert. p. 2). Neither contention is true.

In *Blake v. Arnett* two Indians of the Hoopa Valley Reservation of Yurok ancestry sought to establish their right to hunt and fish in the area of the Reservation which had once been the Klamath River Reservation on land which had passed into private ownership. At the request of the defendant landowner and over the objections of the two plaintiffs, the District Court certified the action as a class action encompassing all Indians of the Hoopa Valley Reservation.

On the merits the Ninth Circuit affirmed the decision of the District Court that the Indian plaintiffs did not retain communal hunting and fishing rights on lands which had been allotted to individual Indians or patented to non-Indian settlers pursuant to the General Allotment Act of 1887 and the Act of June 17, 1892 which opened this area of the Hoopa Valley Reservation to settlement. It modified the District Court's order on the motion to certify the class, however, so as to confine the class to Indians of Yurok ancestry. In refusing to include Indians of Hupa ancestry in the plaintiff class, the Ninth Circuit stated that there was no showing that any "Hoopas" had made claims similar to the two plaintiffs, that neither plaintiff was a "Hoopa," and that there was evidence of "disagreement between the Hoopas and the Yuroks as to the rights that accrued to them in their capacity as reservation Indians," citing *Short v. United States.* Thus the Ninth Circuit left *undecided* whether Indians other than those of Yurok ancestry have rights to hunt and fish on these privately owned lands.

The holding of *Blake v. Arnett* that Yurok Indians have no right to fish on private lands in the portion of the

Hoopa Valley Reservation that once was the Klamath River Reservation presents no conflict with the decisions of the Court of Claims in *Short v. United States* that all Indians of the Reservation have the right to share equally with all other Indians of the Reservation in the benefits of the unallotted communal lands of the Reservation that continue to be held in trust for them by the United States.

The Hoopa Valley Tribe's suggestion that the decisions of the Court of Claims are inconsistent with this Court's decision in *Mattz v. Arnett,* 412 U.S. 481 (1973) is frivolous. In that case this Court considered whether the State Department of Fish and Game had jurisdiction over an Indian who was fishing within the portion of the Hoopa Valley Reservation that had once been the Klamath River Indian Reservation. The question was whether this area had lost its status as an Indian reservation or whether it remained "Indian country" within the meaning of 18 U.S.C. Section 1151. This Court reviewed the history of this area and the effect of the 1891 executive order which added the area along with other land to the Hoopa Valley Reservation, coming to the same conclusions as did the Court of Claims in the present case:

> "By the specific terms of that [1891 executive] order, the Hoopa Valley Reservation . . . was *extended* so as to include all land one mile in width on each side of the river, from 'the present limits' of the Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made *part of* the Hoopa Valley Reservation, as extended.
>
> The reason for *incorporating* the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President

> to 'set apart' no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reservations already had been so set apart. Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly, the President turned to his authority under the Act to *expand* an existing, recognized reservation. He *enlarged* the Hoopa Valley Reservation to *include* what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts. The President's continuing authority so to *enlarge* reservations, and, specifically, the legality of the 1891 Executive Order, was affirmed by this Court in *Donnelly v. United States,* 228 U.S. 243, 255-259 (1913), reh. denied, 228 U.S. 708, and is not challenged here." 412 U.S. at 493-4 (emphasis added).

In two places in the *Mattz* case the Court cites the trial judge's report in *Short v. United States* which was later adopted by the Court of Claims as its 1973 decision on liability (412 U.S. at 48[illegible], n. 8 and at 498, n. 20).

B. The Decisions of the Court of Claims Turn on the Facts of This Case and Will Have No Impact beyond the Hoopa Valley Reservation.

The Court of Claims resolved all of the questions presented by this case by interpreting the Act of April 8, 1864 which authorized the President to establish not more than four reservations to accommodate all of the Indians of California and by interpreting the executive orders locating the Hoopa Valley Reservation and enlarging it. It weighed the statements and actions of the early administrators of the Reservation who were charged with setting the machinery of the statute and executive orders in motion while they were yet untried and new.[8]

Voluminous documentary evidence that had been assembled through a number of years of discovery was introduced into evidence at trial. Numerous witnesses were examined and subjected to full cross-examination.[9] The trial judge permitted the Hoopa Valley Tribe to participate fully in the trial and in post-trial briefing as *amicus* even though it had resisted participation until shortly before the trial.[10]

Following the extensive post-trial briefing, the trial judge spent nearly two years in meticulously analyzing the evidence and the arguments and in preparing extensive and carefully worded findings, rejecting petitioners' factual contentions as having no evidentiary support (B7, 8, 11 and 13).[11] Both petitioners filed objections to the trial judge's recommended decision and findings. Another round of extensive briefing followed before the judges of the Court of Claims, and after oral argument, the seven judges unanimously adopted the decision and findings of the trial judge without change. These findings of fact are conclusive, and would not be open to question on review. *United States v. Esnault-Pelterie,* 303 U.S. 26, 29-30 (1938); *Luckenbach S.S. Co. v. United States,* 272 U.S. 533, 538 (1926).

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[8] This approach was approved by this Court in *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933).

[9] Although both petitioners had scheduled a number of government officials and members of the Hoopa Valley Tribe as witnesses in a pre-trial statement filed with the Court, none of them were called.

[10] The suggestion by the Tribe that it had no control over the litigation (HVT Pet. for Cert., p. 12) is a distortion of the facts.

[11] Among the assertions rejected on factual grounds are the very same facts being asserted again in the petitions for certiorari.

The statute, executive orders and administrative actions determinative of this case are relevant only to the Hoopa Valley Reservation and can have no application to other reservations.

> "When a reservation is established by . . . statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action." *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 103 (1949).

The Hoopa Valley Tribe's claim that sixty-eight other reservations are threatened by this case just is not true (HVT Pet. for Cert., p. 26). Each of those other reservations was created under different statutes and executive orders, and has a different history of administrative treatment. Any question of which Indians are the intended beneficiaries of those reservations will have to be resolved by an interpretation of the statutes, executive orders, and treaties pertaining to those reservations.[12]

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[12] *See, e.g.,* Navajo Reservation (Aneth Extension): *United States v. Jim,* 409 U.S. 80 (1972); Red Lake Reservation: *Chippewa Indians of Minnesota v. United States,* 301 U.S. 358 (1937); Wind River Reservation: *Shoshone Tribe v. United States,* 299 U.S. 476 (1937); Quinaielt Reservation: *Halbert v. United States,* 283 U.S. 753 (1931) and *Quinaielt Tribe v. United States,* 102 Ct. Cl. 822 (1945); *United States v. Choctaw Nation,* 179 U.S. 494 (1900); Nez Perce Reservation: *Joseph's Band v. United States,* 95 Ct. Cl. 11 (1941); *The Crow Nation v. United States,* 81 Ct. Cl. 238 (1935).

The Hoopa Valley Tribe made a similar contention in its Petition for Certiorari in 1974 when it predicted that the 1973 decision of the Court of Claims would have important effects on the other three California reservations. That prediction has not come true. The 1973 decision of the Court of Claims has been on record for more than eight years, and our research reveals no reported case involving another reservation in which it has been cited. The Hoopa Valley Tribe's prediction that the 1981 decision will have profound effects on 68 other reservations is similarly baseless.

C. Nothing Has Occurred in This Case to Warrant the Court Granting Certiorari Now when It Denied Certiorari Eight Years Ago on the Same Issues.

Insofar as it is challenged by the petitioners, the Court of Claims's 1981 decision is identical to its 1973 decision. The Hoopa Valley Tribe incredibly asserts that the 1981 decision "is the first substantive opinion of the court itself in this case; its summary affirmance in 1973 of the cryptic 115-page recommended decision of the Commissioner gave little indication of the true direction in which the Court of Claims was moving" (HVT Pet. for Cert., p. 15). The Court of Claims "adopted" and "made part of its judgment" the findings of fact and ultimate findings and conclusions of the trial judge (B112). There was no question as to the "direction" the Court of Claims was moving—it was the *identical* "direction" as the trial judge. The Hoopa Valley Tribe had no misconception about that direction in 1973; it promptly filed a petition for certiorari which was denied (416 U.S. 961 (1974)) and then filed a petition for rehearing which was also denied (417 U.S. 959).

If the Hoopa Valley Tribe still had any questions about the "direction" the Court of Claims was moving, they should have been answered by the judgment of that court dismissing *Hoopa Valley Tribe v. United States* (I1-31).

The 1981 decision which is the subject of these petitions for certiorari is the *third* time the Court of Claims has stated its conclusions on liability in this case.

No change in the posture of the case supports a grant of review. The 1981 decision is still an interlocutory decision of the Court of Claims. The court still has not completed identifying the plaintiffs who will be eligible to share in the judgment nor has it determined the amount of the judgment. The case is essentially at the same stage as it was when the petitions for certiorari were denied in 1974.[13]

Nor has there been any development in federal Indian law since 1974 which could affect the decision in this case (see HVT Pet. for Cert., p. 16). This decision must turn on interpretations of the 1864 act and the executive orders of 1876 and 1891. None of the "subsequent decisions" of the Supreme Court, none of the "subsequent enactments of Congress" cited by the Hoopa Valley Tribe (HVT Pet. for Cert., p. 16) pertain to the questions presented by the petitions. Congress's emphasis in the last eight years on tribes as the "focus of federal Indian legal and economic policy" (HVT Pet. for Cert., p. 17, n.27) does not reverse Congress's decision in 1864 and the President's decisions in 1876 and 1891 that the Hoopa Valley Reservation would be for all California Indians who settled there, and not for any particular tribes.[14]

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[13] This Court should not abet petitioner's strategy of forcing inordinate postponements of the resolution of these claims. The briefing on the motions whose denial gave rise to these petitions cause a complete disruption of the case below for almost three years. It has been almost nineteen years since the case was filed. These repeated requests for interlocutory review prolong further a case which is already one of the oldest cases on the docket of the Court of Claims. (A13).

D. The Reasons Petitioners Proffer for Granting the Writ Are All Specious.

1. The Decisions of the Court of Claims Involve No Question of Unlawful Termination of the Hoopa Valley Tribe.

The Court of Claims has made no order terminating the Hoopa Valley Tribe. The tribe contradicts itself by first saying that the Court of Claims terminated the tribe and then admitting that its use of the word "termination" is based entirely on its own speculations as to a course of action it fears the Department of the Interior will undertake in response to the judgment of the Court of Claims (HVT Pet. for Cert., p. 18, n.28).

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[14] Interpretation of the Act and executive orders cannot be influenced by the particular Indian policy in vogue at the time the court's judgment is rendered. Federal Indian policy has wavered between the two extremes of, on the one hand, encouraging Indians to assimilate into the white culture and, on the other hand, fostering separate Indian communities (see, *Arenas v. United States*, 322 U.S. 419 (1944)). The policy of "individualization of Indian ownership and control" which the Hoopa Valley Tribe claims has been "long since rejected by the Congress" (HVT Pet. for Cert., p. 22) had a renaissance as recently as the 1950's in a series of "termination acts" which typically provided for communally held reservation lands or the proceeds of their sale to be distributed to individual Indians. (*E.g.*, California Rancheria Termination Act, Act of August 18, 1958, Pub. L. 85-671, 72 Stat. 619, *as amended* by Act of August 11, 1964, Pub. L. 88-419, 78 Stat. 390 (not codified); Western Oregon Termination Act, 25 U.S.C. §§ 691-708; Klamath Tribe: 25 U.S.C. 564-564x).

If the Department of the Interior were to respond fairly and responsibly to the decisions of the Court of Claims, some of the results feared by the Hoopa Valley Tribe would come to pass—and rightly so. The United States would discontinue treating the Square and the Addition as two distinct governmental units and would not permit the Hoopa Valley Tribe to manage the Hoopa Valley Reservation (HVT Pet. for Cert., p. 18, n.28). The Department of the Interior could assist all Indians of the Reservation—as defined by the Court of Claims—in forming a governing body, representative of the entire reservation.[15]

When the Department of Interior recognized the Hoopa Valley Tribe as a governing body with power to manage virtually all of the unallotted lands of the entire Hoopa Valley Reservation, it disenfranchised the majority of Indians of the Reservation (the respondents) both politically and economically. An election to create a governing body representative of all Indians of the Reservation would help rectify this past mistake and help avoid future ones.

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[15] The other results envisioned by the Hoopa Valley Tribe: that "nonresident plaintiffs may choose to authorize environmentally damaging action on the Square for individual gain" and that respondents will seek "sale of all reservation assets for one final large individual payment" are results dreamed up by the Hoopa Valley Tribe, dreams the respondents do not share (HVT Pet. for Cert., p. 18, n.28 and p. 19). Merely restating this argument shows its absurdity.

The Court of Claims, however, has undertaken only to do that which is within its jurisdiction—to render a money judgment in favor of respondents against the United States.

The entire argument of the Hoopa Valley Tribe is based on the false premise, rejected by the Court of Claims, that "since time immemorial the unallotted land of the Hoopa Square, set aside as an Indian reservation in 1864, has been used and occupied as tribal property by the Hoopa Valley Tribe" (HVT Pet. for Cert., p. 18).[16] Since the members of the Hoopa Valley Tribe (an organization which did not even exist until 76 years after the Reservation was established) received no rights to the Square superior to the rights obtained by other Indians who settled on the Reservation as enlarged, all of the authorities cited by the Hoopa Valley Tribe are irrelevant. To the extent that there is a question in this case of the United States Government stripping Indians of vested rights in a reservation, it is the respondents who were the victims, not the Hoopa Valley Tribe.

2. The Court of Claims Has Not Created a Novel Kind of Indian Property as the Hoopa Valley Tribe Contends.

The Hoopa Valley Tribe misstates the conclusion of the Court of Claims when it says that the Court *divested* the Hoopa Valley Tribe of its ownership in favor of individual

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[16] The court held as a matter of *fact*, that the Square was not the exclusive aboriginal homeland of the Hupas (B7).

Indians and their descendants (HVT Pet. for Cert., p. 24). First, the Hoopa Valley Tribe was never vested with the ownership it claims. Secondly, the Court of Claims did not "vest" individual Indians and their descendants with individual shares in the communal property which can be assigned or devised. Instead, the Court of Claims has recognized that the lands are held by the United States for the *communal* benefit of all Indians of the Reservation and that each individual who is a member of that community is entitled to his proportionate share of the communal income from that property. This is not a novel concept in Indian law.

In *Cherokee Nation v. United States,* 40 Ct. Cl. 252 (1905), aff'd 202 U.S. 101 (1906), per capita payments were made to *individuals* to reimburse them for property taken from their ancestors by the Government. The court discussed the nature of the property interest involved:

> "The officers of the Government, under stress of circumstances—that is to say, the expectations of the Indians—have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. Whenever the Government has paid for a cession of Indian land *per capita* to every member of an Indian community, share and share alike, it was because the Indians knew that their lands were communal property and that they, as communal owners, were entitled to the purchase money." 40 Ct. Cl. at 325-326.

In *McGhee v. Creek Nation,* 122 Ct. Cl. 380, *cert. denied* 344 U.S. 856 (1952) the Court of Claims made a similar ruling regarding Creek Indians. The fact that a portion of the old tribe had organized into a federally recognized tribal entity did not defeat the individual descendants' rights to *per capita* judgments for the injuries done to their ancestors.

Under the statute and executive orders creating the Hoopa Valley Reservation, entitlement to the Reservation's benefits depended on the individual Indian's moving to the Reservation. A unique aspect of this case is that all of the communal beneficiaries of the Hoopa Valley Reservation lands are not yet organized into a tribal government. There being no governing body for these unorganized respondents, there is no communal entity to whom to award the judgment. This is not unprecedented in Indian cases. *McGhee v. Creek Nation,* 122 Ct. Cl. 380 (1952); *Cherokee Nation v. United States,* 40 Ct. Cl. 252 (1905).

Because of the type of claim involved, the judgment must be to individuals. What respondents are seeking in the court below is their aliquot share of the income generated from the Reservation—income which the United States has withheld from respondents and has distributed solely for the benefit of individual members of the Hoopa Valley Tribe.[17]

3. The Timber Statute Referred to by Petitioners Gives the Department of the Interior No Power to Withhold Distributions of Timber Income from Indians Entitled to That Income.

Title 25, Section 407 of the United States Code authorizes the sale of timber on Indian lands by the Department of the Interior. The Secretary is directed to use the proceeds from such sales, after deductions for administrative expenses, "for the benefit of the Indians or members of the tribe or tribes concerned." Prior to its amendment in 1964, the statute required use of the proceeds "for the benefit of the Indians of the Reservation" (Act of June 25, 1910, chap. 431, § 7, 36 Stat. 857). The amendment did not mean that only Indians organized into tribes could benefit from the sale of timber; the amendment was intended to clarify that revenues from the sale of reservation timber could be used for the benefit of those Indians entitled to them who did not reside on the reservation as well as for the benefit of those who did reside on the reservation (H.R. No. 1292, 88th Cong., 2nd Session (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2162-5).

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[17] The Court of Claims found in 1973 that the United States had distributed more than $12.6 million dollars in *per capita* payments to individual members of the Hoopa Valley Tribe between 1955 and 1969.

Nowhere in the statute or in the legislative history does there emerge any intent to give the Department of the Interior *carte blanche* to override statutes or executive orders and thereby redesignate who the beneficiaries of these timber proceeds should be. Yet this is what the United States argues in its petition at pages 21 and 22.

4. The Court of Claims Has Not Arrogated to Itself a Question Reserved to the Political Branches.

The fallacy underlying petitioners' "political question" argument is the assumption that Congress recognized the Hoopa Valley Tribe as the governing body and beneficial owner of the Square (HVT Pet. for Cert., p. 28). The Court of Claims reviewed all the evidence petitioners could muster to support that factual claim and rejected it.

The Court held, instead, that *Congress* had intended the Hoopa Valley Reservation for any California Indian who settled there, that the Department of the Interior faithfully executed that congressional purpose for nearly a century, but that in 1955 the Department of the Interior broke faith with Congress's purpose in bestowing the benefits of the major portion of the Reservation solely on the members of the group organized in 1950 as the Hoopa Valley Tribe. The Department of the Interior's authority to bestow benefits on Indians must be grounded in Congressional delegation of authority to the Department (*Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949)).

In its 1973 decision the Court of Claims also found that the Department had contradicted the purpose of the Executive Order of 1891 by distributing Reservation income exclusively for the benefit of the members of the Hoopa Valley Tribe.

> "Although the purpose of the executive branch in enlarging the reservation would seem to be apparent from the facts, [the United States] reaches a different result entirely; it contends that the purpose of the executive order was to join the parts of the enlarged reservation only technically, for administrative purposes only, the Indians of each tract to retain their rights in their respective tracts. No hint of such a purpose appears on the face of the executive order. And no support for such purpose appears in the data said by [the United States] to prove it—the background and origins of the executive order and legislation affecting the Klamath River Reservation, a part of the Addition. An exhaustive inquiry into the data, set out in detail in the accompanying findings, fails to reveal even a mention of the purpose as defendants assert, much less the compelling showing which would be required

> to curtail the ordinary consequence of the executive order." (B11)

The political decision was made by the Congress and the President long ago before the court was called upon. All the Court of Claims did in its 1973 and 1981 decisions was to review the evidence and to construe the intent of an Act of Congress and implementing executive orders. The court has performed as courts are intended to perform. This case presents no question of a court taking upon itself a political question reserved to another branch of government.

CONCLUSION

For all of the reasons stated, the petitions of the United States of America and the Hoopa Valley Tribe for a writ of certiorari to review the decision of the United States Court of Claims in *Short v. United States*, No. 102-63 (September 23, 1981) should be denied.

Respectfully submitted,
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February 24, 1982

Appendix

2

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Nos. 81-1371, 81-1373

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA
and the
HOOPA VALLEY TRIBE,
Petitioners,

vs.

JESSIE SHORT, et al.,
Respondents.

APPENDIX TO OPPOSING BRIEF

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APPENDIX

In the United States Court of Claims

No. 568-77

(Decided March 21, 1979)*

THE HOOPA VALLEY TRIBE v. THE UNITED STATES

Jack Tomlinson, attorney of record, for plaintiff. *Neil R. Bardack, Tomlinson and Bardack, Michael Kip Maly* and *Murphy, Weir & Butler,* of counsel

James E. Brookshire, with whom was *Assistant Attorney General James W. Moorman,* for defendant. *C. David Redmon,* of counsel.

Before Davis and Kunzig, *Judges.*

ON PLAINTIFF'S MOTION TO RETRANSFER AND DEFENDANT'S MOTION TO DISMISS

Per Curiam: This case comes before the court on plaintiff's request for review by the court of the recommended decision of Trial Judge David Schwartz, filed July 13, 1978, on plaintiff's motion to retransfer the case to the United States District Court for the Northern District of California and on defendant's motion to dismiss the petition (complaint). Oral argument has been had and the court has also considered the written briefs of the parties. Since the court agrees with the recommended decision of the trial judge, as hereafter set forth, it affirms and adopts that decision, together with the following supplemental paragraphs, as the basis for its judgment in this case.

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*Reported at 596 F.2d 435.

1. On the question of the jurisdiction of the District Court and of this court, we add the following to the trial judge's discussion (which, as stated above, we adopt): As the trial judge points out, it is by now firmly established that, where the prime effort of the complaining party is to obtain money from the Federal Government, this court's exclusive jurisdiction over non-tortious claims (above $10,000) cannot be evaded or avoided by framing a District Court complaint to appear to seek only injunctive, mandatory, or declaratory relief against Government officials or the Federal Government. *Sec American Science & Engineering, Inc. v. Califano,* 571 F.2d 58 (1st Cir. 1978), and cases cited; *Sherar v. Harless,* 561 F.2d 791, 793-94 (9th Cir. 1977); *Alabama Rural Fire Ins. Co. v. Naylor,* 530 F.2d 1221, 1226-30 (5th Cir. 1976); *International Engineering Co., Div. of A-T-O, Inc., v. Richardson,* 512 F.2d 573 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1048 (1976); *Warner v. Cox,* 487 F.2d 1301 (5th Cir. 1974); *Mathis v. Laird,* 483 F.2d 943 (9th Cir. 1973). Here, the objective of the suit is obviously to force payment by the Government to plaintiff (and its members) of all the monies derived from the timber of the Square of the Hoopa Valley Reservation, instead of the lesser share due plaintiff (and its members) under *Jessie Short v. United States,* 303 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied,* 416 U.S. 961 (1974). The jurisdiction of this court over this kind of suit is as clear as it was in *Jessie Short, supra,* and the multitude of other cases seeking payment from the Treasury of monies to one or another

Indian tribe or Indian individuals.[1] Conversely, under the authorities cited *supra,* the District Court lacks jurisdiction of this action (even though framed purely in equitable or declaratory terms) which attempts, in direct impact, to obtain these monies from the Treasury.[2]

2. On the merits, we agree with the trial judge (for the reasons he gives) that, with one possible exception, all of the issues now raised by plaintiff[3] were decided adversely to it in the *Jessie Short* litigation, and cannot now be pursued because of the doctrines of collateral estoppel and res judicata. Counts I and II of the complaint basically

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[1] The trial judge rightly points out that the United States holds legal title to Indian funds held in the Treasury. Plaintiff says that, even so, this court has no jurisdiction where the only issue is which set of Indians will obtain the money, and accordingly there will be no net detriment to the Treasury. The error in that proposition is shown, not only by the numerous cases (before the Indian Claims Commission and before this court) in which Indian tribes contend over which one shall be paid for the taking or loss of certain property, but also by this court's third-party practice (41 U.S.C. § 114(b) (1976); Ct. Cl. R. 41) which contemplates that the court will consider conflicting claims to money held by the United States. *See Richfield Oil Corp. v. United States,* 138 Ct. Cl. 520, 522-23, 151 F. Supp. 333, 335 (1957); *Christy Corp. v. United States,* 181 Ct. Cl. 768, 771, 772, 387 F.2d 395, 396, 397 (1967); *Bowser, Inc. v. United States,* 190 Ct. Cl. 441, 448-49, 420 F.2d 1057, 1062 (1970). Plainly, the plaintiff relied on that principle when it sought to intervene, before the court rendered its decision, in the *Jessie Short* litigation.

[2] Insofar as plaintiff's argument is that this court has no jurisdiction over a monetary claim which is equitable in nature, that contention is incorrect. *Pauley Petroleum Inc. v. United States,* No. 197-69, slip op. at 11-13 (Ct. Cl. Jan. 24, 1979); *Mitchell v. United States,* Nos. 772-71, 773-71, 774-71, and 775-71 (Ct. Cl. Jan. 24, 1979).

[3] To discover the issues now raised, we have taken account of the complaint filed in the District Court as interpreted and explained by plaintiff's briefs on the current motions.

raise issues litigated and determined against plaintiff in *Jessie Short*—as Trial Judge Schwartz demonstrates.[4] Plaintiff had a full and fair opportunity to litigate each of those issues before this court made its determination, and application of collateral estoppel is in no way unfair. *See Parklane Hosiery Co. v. Shore,* 47 U.S.L.W. 4079 (1979). The precise issue presented in Count III did not arise before this court's first determination in *Jessie Short* but issues underlying and determining that particular question were litigated and decided in *Short*; moreover, plaintiff has been (on its own intervention) a party to all proceedings in the Trial Division since the court's liability decision in *Jessie Short,* 202 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied,* 416 U.S. 961 (1974), and could and should have presented, in that litigation, the apportionment problem it now seeks to raise in Count III. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 56.1(2) ("Effect of Failure to Interpose Counterclaim") (Tent. Draft No. 1, 1973).

The one issue now presented by plaintiff which may not have been directly litigated and decided in *Short* is whether the United States is liable to the Hoopa Valley Tribe because, over a period of years, the Government told the Tribe that the latter alone owned the timber of the Square and this court later determined otherwise when other Indians brought suit in the *Short* litigation. But that unusual contention need not detain us long. The first thing to note is that the Government fought extremely hard against the *Short* plaintiffs (to the extent of seeking review in the Supreme Court) and attempted as long as it reasonably could to vindicate its position that the Square timber belonged only to the Hoopa Valley Tribe (and its members). Also, it is impossible to say that the Government's position was frivolous, insubstantial or unreasonable; indeed, plaintiff Hoopa Valley Tribe should be the last to take such a position[5] since it, too, fought mightily (through different counsel) in *Short* for the other result and the Tribe still considers our conclusion to be wrong (as shown by other parts of plaintiff's argument in this very case). The United States, having at all times acted reasonably, cannot be convicted of breach of trust to the Hoopas because this court subsequently held that it was wrong in its belief as to sole Hoopa ownership and our ruling forced a change in distribution of the timber revenues. *See United States v. Mason*, 412 U.S. 391, 397-400 (1973). Plaintiff's breach-of-trust claim simply has no valid foundation.

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[4] It must not be forgotten that, not only did the Hoopa Valley Tribe participate actively as *amicus* in the proceedings in the Trial Division, but that at the court level it requested and was granted full intervention as a party.

Accordingly, on the basis of the trial judge's opinion as supplemented above, plaintiff's motion to retransfer to the District Court is denied, the defendant's motion to dismiss the complaint (which we treat as a petition in this court) is granted, and the petition is dismissed.

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[5] In the District Court, before transfer, counsel for the Tribe in this case curiously argued that the Federal Government should have known that other Indians could properly claim the Square timber. That same argument is incorporated in its briefs to us in this case.

Opinion of Trial Judge

SCHWARTZ, *Trial Judge:* The plaintiff, Hoopa Valley Tribe, has moved under 28 U.S.C. § 1406 (1976) to retransfer this case to the District Court for the Northern District of California, as a case within the exclusive jurisdiction of that court. On motion of the United States the district court had previously transferred the case to this court under 28 U.S.C. § 1406(c) (1976), as a case within this court's exclusive jurisdiction. The motion has been heard, and this recommended opinion and decision is filed, pursuant to an order of reference of March 21, 1978.

In the Tribe's complaint, as filed in the District Court, the named defendants were the Secretary of the Interior and the Commissioner of the Bureau of Indian Affairs. The prayer was for equitable and declaratory relief. The district court, nevertheless, ruled that "this action is essentially one for a money judgment against the United States, and the Court of Claims has exclusive jurisdiction over this action [see *Mathis* v. *Laird,* 483 F.2d 943, 944 (9th Cir. 1973)]." *Hoopa Valley Tribe* v. *Andrus,* No. C-76-1405 RHS (N.D. Cal. Oct. 20, 1977). The district court thereupon substituted the United States for the named defendants and transferred the case to this court.

In moving to retransfer, plaintiff contends, as it did in the district court, that the action seeks only equitable and declaratory relief against Government officers, and is thus within the exclusive jurisdiction of the district court under 28 U.S.C. § 1331(a) *as amended by* Act of Oct. 21, 1976, Sec. 2, Pub. L. 94-574, 90 Stat. 2721, and 28 U.S.C. §§ 1361-1362 (1976) and 5 U.S.C. §§ 701-706 (1976), especially

§ 702 *as amended by* Act of Oct. 21, 1976, Sec. 1, Pub. L. 94-574, 90 Stat. 2721.

A second motion, by the Government, seeks the dismissal of the complaint on the ground of res judicata or collateral estoppel. This motion originated in the hearing on the motion to retransfer, where much of the Government's argument was to the effect that the Tribe was seeking to relitigate issues decided against it in *Short* v. *United States,* 202 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied,* 416 U.S. 961 (1974), to which the Tribe responded that jurisdiction, and not res judicata, was the only issue before the court on the motion to retransfer. The trial judge thereupon invited the Government to move to dismiss the complaint on the ground of res judicata, so that all the contentions could be considered at one time. The motion was made, referred to the Trial Division by order of May 26, 1978, and both motions have now been briefed.

Both parties urge that issues decided by the district judge should not be reconsidered. The Tribe argues against disturbance of the district court's denial of the Government's motion for summary judgment on the ground of res judicata. The Government argues against disturbance of the district court's denial of its own jurisdiction. Neither argument is persuasive. A transcript of proceedings before the district judge shows sufficiently that he would be willing to reconsider the matter of jurisdiction, if the Court of Claims sent the case back. As for the district judge's decision on res judicata, if that ruling is the law of the case, it is nevertheless not conclusive. Since the district judge could reconsider the matter upon a retransfer, it may here be reconsidered. Besides, the district judge could not have been as familiar as this court with the issues litigated and decided in *Jessie Short*. The record in *Jessie Short* was unavailable to him and the text of the decision, as cited to him in the *Federal Reporter,* does not include the findings, which as will be seen are highly relevant on the res judicata-relitigation aspect of the case.* The merits of the contentions with respect to all issues will therefore be addressed.

The origins of the controversy in both *Jessie Short* and the instant case go back to the early 1950's and the growing value of the timber in the portion known as the Square of the Hoopa Valley Reservation in Northern California. The Square is an area 12 miles square which constituted the entire original reservation when it was established in 1864. 202 Ct. Cl. at 888-99, findings 10-21. Hoopas and other Indians lived on the Square at that time and thereafter, although as time went on and members of Indian bands intermarried, apparently most or all of the Indians of the Square thought of themselves as Hoopas. 202 Ct. Cl. 899-900, 901-02, findings 22-28, 30-32. An area contiguous to the Square, inhabited primarily by Yurok Indians and known as the Addition, was added to the Reservation in 1891. 202 Ct. Cl. at 902-03, findings 33-34. A portion of the Addition known as the Connecting Strip needs no mention here.

At least in modern times, there has been no particular timber on the Addition. The Square, a deep valley on the

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*It is not clear from the record before us whether the District Court had our findings before it.

Trinity River, is heavily wooded. On May 13, 1950, the Indians of the Square organized themselves as the Hoopa Valley Tribe (202 Ct. Cl. at 962, finding 145); none of the tribes inhabiting the Reservation in aboriginal times were organized as such (202 Ct. Cl. at 950-51, findings 109, 111-112). In the late 1950's the Secretary of the Interior, on the basis of an opinion by the Solicitor, 65 Dec. Dept. Int. 59 (1958), began to distribute the revenues from the unallotted trust timberlands of the Square, annually, to the members of the Tribe per capita, to the exclusion of the Indians of the Addition. 202 Ct. Cl. at 970-73, findings 166-174.

In 1963 the excluded Indians brought suit for what they claimed was their share of the timber revenues. Some 3,300 persons joined as plaintiffs, alleging themselves Yuroks of the Addition. In *Jessie Short* the court ruled that every Indian of the Reservation is equally entitled to a share of the profits from trust timberlands wherever located on the Reservation. 202 Ct. Cl. 870, 486 F.2d 561. The Hoopa Valley Tribe, essentially the real party defendant on behalf of its members, participated in the trial as an *amicus curiae.* Through its counsel, the Tribe cross-examined plaintiffs' witnesses, examined witnesses for the defense, introduced exhibits, stipulated facts and briefed the legal issues. In the course of the review by the court of the trial proceedings, the Tribe was permitted to intervene as a party defendant. 202 Ct. Cl. 870, 873.

Following the denial of certiorari on petition of both the Tribe and the United States, 416 U.S. 961 (1974), the case proceeded to the laborious task of determining which of the 3,800 plaintiffs (additional plaintiffs were now permitted to intervene) are bona fide Indians of the Reservation equally entitled with all other such Indians to a per capita share of the annual timber revenues. The making of these determinations has raised difficult and novel issues of qualification and disqualification by place of birth, degree of Indian blood, residence and other considerations.

As a starting point to determining which Indians were qualified, each plaintiff filled out a life-history questionnaire developed and agreed upon by both sides. The answers to the questionnaires now have been scrutinized, checked and objected to by the defendants, the United States and the Hoopa Valley Tribe. Presently, consideration of cross-motions for summary judgment for and against some 3,200 plaintiffs has been suspended at the joint request of the parties, so that they may explore the possibility of a mediated final resolution to the controversy.

Upon the denial of certiorari to this court's decision that all the Indians of the Reservation were equally entitled to the timber revenues, the Secretary of the Interior ceased to distribute the revenues exclusively to the members of the Hoopa Valley Tribe. On the theory that all 3,800 plaintiffs could eventually be held entitled to 70 percent of the revenues and the 1,500 members of the Hoopa Valley Tribe entitled to 30 percent, the Secretary put 70 percent of the annual timber revenues in escrow pending final decision on the number of the plaintiffs in *Jessie Short* qualifying as Indians of the Reservation entitled to per capita distributions of timber revenues. According to the complaint in the present case, the escrow fund now amounts to over $10 million.

The Hoopa Valley Tribe objected, unsuccessfully, to the administrative action escrowing part of the revenues. After exhausting its administrative remedies, the Tribe brought suit in the Northern District of California against the Secretary of the Interior and the Commissioner of the Bureau of Indian Affairs challenging the sequestration of funds. As already noted, the district court transferred the case to this court in the belief that this court has exclusive jurisdiction. Plaintiff seeks a retransfer, asserting the case to be within the exclusive jurisdiction of the district court as a claim for equitable and declaratory relief beyond the jurisdiction of the Court of Claims and different from the relief available in the Court of Claims in the *Jessie Short* case. The Government to the contrary contends the suit to be one for money, within the exclusive jurisdiction of the Court of Claims and dismissible as a transparent effort to relitigate issues already decided in *Jessie Short*.

The complaint in the present suit has three counts. The parties' contentions regarding jurisdiction and res judicata or its closely related doctrine, collateral estoppel, will be discussed with respect to each count. There is no need in this case to distinguish between res judicata and collateral estoppel, two doctrines which embody the principle of the finality of adjudicated matters.[1] "Res judicata" is often used broadly to refer to all binding effects of former adjudications and will be so used here.

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[1] The term "res judicata" has often been used to denote the preclusion of relitigation of a claim by a judgment, when the same parties or those in privity with them and the same cause of action are involved in a second suit (regardless of whether all grounds for recovery or defenses were determined). "Collateral estoppel" refers to the operation of res judicata in a subsequent suit on a different cause of action raising issues determined in the former action. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955);

The Defense of Res Judicata to Counts I and II

Count I. Count I alleges that plaintiff, a tribe "since time immemorial" has from the founding of the Reservation "treated the entire 12-mile Square as its exclusive homeland"; that the timberlands of the Square have at least since 1955 been the exclusive property of the plaintiff by conveyance from the United States authorized by Congress; that the plaintiff's ownership was recognized, from 1955 to 1974, by annual per capita payments of timber revenues and otherwise; that in 1974, 70 percent of the timber revenues were sequestered and "permanently taken" to be used for purposes, other than distribution to plaintiff, deemed by the defendants to be "appropriate for the best interests of the United States of America." No mention is made of the decision in *Jessie Short* or of that decision as the reason for the challenged sequestration by the Secretary and the Commissioner.

It is further alleged that the "sequestration" by the Secretary and the Commissioner is "a taking of plaintiff's private property for public use without just compensation by defendants * * * and is violative of the Fifth Amendment of the United States Constitution"; and that plaintiff

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1B Moore's Federal Practice ¶ 0.405(1) (2d ed. 1974); developments in the law—res judicata, 65 Harv. L. Rev. 818, 820 n.1 (1952). Another set of more modern terms is "merger", "bar" and "claim preclusion" or "extinguishment", on the one hand, and "issue preclusion" on the other. *See* restatement (Second) of judgments (Tent. Draft No. 1, 1973) (Introductory Note to Ch. 3, 1; Introductory Note to Ch. 3, Topic 2, Title E, 143).

has "been deprived of monies which it owns" in excess of $10 million plus interest.

The plaintiff Tribe requests a declaratory judgment that it is "the lawful and exclusive owner of the timber and the proceeds therefrom" and that "the sequestered proceeds be distributed to plaintiff forthwith and that all such future proceeds be distributed solely to plaintiff and its members." Plaintiff seeks also a temporary injunction, until the claim for declaratory relief is finally adjudicated, against any distribution of the proceeds to persons other than plaintiff.

A bolder attempt than Count I to relitigate issues and claims decided in *Jessie Short,* in the guise of a declaratory judgment action, can hardly be imagined. In *Jessie Short,* in which conflicting claims were made to ownership of the timberlands on the Square and the proceeds therefrom, the court decided that plaintiff was not a tribe from time immemorial but was created in 1950, not long before the first distribution of timber revenues (202 Ct. Cl. at 959-67, findings 136-156); that neither plaintiff Tribe nor its members exclusively owned the unallotted trust lands of the Square and that plaintiff's members were not entitled to more than shares in the proceeds equal to those of all the Indians of the Reservation (202 Ct. Cl. at 884-85, 976-79, 980-81 and findings 184, 185, 188, 189).

The claim that the Hoopa Tribe was the exclusive owner of the timberlands was squarely rejected, in favor of a determination that all the Indians of the Reservation owned equal shares. Now in Count 1 the plaintiff alleges the opposite and seeks declarations which by adjudging the Tribe to be the "exclusive owner of the timber and the proceeds therefrom" would squarely reverse the decision in *Jessie Short.* The count is patently defective under the doctrine of res judicata. Comment on the issue of jurisdiction is for the moment postponed.

Count II. This count adds the following to the allegations in Count I of exclusive ownership of the Square's timberlands by the plaintiff Tribe: that in the program for the allotment of lands of the Reservation, in 1892-1933, the residents of the Addition received allotments averaging 44 acres each and the residents of the Square received allotments averaging 5 acres; that the unequal allotments created "a duty owed by defendants and their predecessors" to hold the timberlands of the Square in trust "solely for the benefit of plaintiff and its members"; that since 1974 the defendants have diverted 70 percent of the revenue from the timberlands to a new trust for Indians of the Addition. The alleged resultant "taking" is said to be a breach of defendants' fiduciary obligation to plaintiff and a denial of equal protection of the law. Defendants, it is said, "must restore the assets of plaintiff's trust which have been wrongfully taken."

The prayer is for a judgment against defendants, the Secretary of the Interior and the Commissioner, "in their capacity as trustee for plaintiff," declaring their breach of trust for having distributed Reservation lands to be "in denial of due process and equal protection of the law" and asking for a "judgment mandating defendants to restore the assets of plaintiff's trust which have been taken." The allegations as to fiduciary duty, breach of trust and diversion of trust property, due process and equal protection add only additional legal theory to the allegations in Count I of a nonrecognition of the plaintiff Tribe's exclusive title to the timberland and its revenues. The only matter new in Count II over Count I is the allegation that plaintiff's exclusive ownership arose from unequal allotments of land on the Addition and the Square. This contention or one very like it—that the unequal allotments were recognition that the Square was a separate reservation, owned, with its timberlands, exclusively by the Hoopas—was made, considered and rejected in the course of the litigation in *Jessie Short, see* 202 Ct. Cl. 870, 925-50, 979-80, findings 78-108, 186.

The argument is frivolous. The number of applicants for allotment of land near their homes and the amount of land available for allotment was such that the Indians of the Square received on an average much smaller allotments than the Indians of the Addition. The timberlands on the Addition, deemed not suitable for individual husbandry, were not allotted and kept by the Government as trust lands. The allotment program and its relation to the case were fully explored in findings 78-108, 186 of the decision in *Jessie Short* and the arguments of the Tribe based on the program were rejected. Only the desire to believe can find in the facts of the allotments evidence in support of the claim—squarely contrary to the claim determined in *Jessie Short*—that the Hoopas, as the Tribe constituted on the Square have title to the trust timberlands located on the Square. For a description of the allotment program generally see M. Price, LAW AND THE AMERICAN INDIAN—READINGS, NOTES & CASES 531-72

(1973); D. Getches, D. Rosenfelt & C. Wilkinson, 2 FEDERAL INDIAN LAW 844-71 (1977).

In any event, the decision in *Jessie Short* was against the Hoopa's claim of exclusive ownership, and Count II of the present complaint renews the same claim. The introduction of Government officers as the alleged takers and wrongdoing trustees adds nothing to the earlier case, in which the United States was correctly recognized by all as the authority in charge of the Reservation, its timberlands and the distribution of the revenues therefrom. And the present argument based on the allotment program is merely an additional legal argument in a second suit between the same parties on the same claim.

It is suggested that in this suit against the United States, the Hoopa Valley Tribe is not bound by the adjudication in *Jessie Short* because the two were not adversaries in that case; that the doctrine of res judicata or at least that part of it referring to the preclusion of relitigation of claims is limited to adversaries in the former suit. The contention ignores the force of the relationships among the parties to *Jessie Short*. Plaintiff Yuroks there were suing a trustee, the United States, for an adjudication that they were co-beneficiaries with the Hoopas. The Hoopa Tribe came into the case as an *amicus* aligned with the Hoopa's trustee, the defendant United States. The Tribe, as an *amicus,* examined and presented witnesses and briefed the issues, intervened as a co-defendant, and suffered a final judgment rejecting the Tribe's claim to exclusive Hoopa ownership and adjudicating that the Yuroks were co-beneficiaries with the Hoopas, on a per capita, equal basis, of the trust administered by the United States. Now the Hoopa Tribe purports to relitigate with the United States, its trustee (or the trustee's officers, which comes to the same thing), the claim of the Hoopas to sole-beneficiary status, and if the Hoopas are not to be sole beneficiaries, the relative shares of the Hoopas and Yuroks. These are the very issues determined, against the contentions of both the Hoopas and their trustee, United States, in *Jessie Short*.

It would be destructive of the policy against relitigation of matters determined by judgments to allow such a relitigation on the ground that the Hoopa Tribe and the United States were not adversaries in the earlier case. And it is not the law that the Hoopa Tribe may relitigate this claim with its former co-defendant, its trustee. A short answer to the Tribe's contention that it was not an adversary of the United States might be based on the relationships of the three parties to *Jessie Short*. But it is enough to say that the Tribe would be bound by the former judgment, even if the United States had not been a party to the former suit. "A party [the Tribe] precluded from relitigating an issue with an opposing party [the Yurok plaintiffs in *Jessie Short*] * * * is also precluded from doing so with another person [the United States] unless he [the Tribe] lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue. * * * ". RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Draft No.2, 1975), § 88. This is the rule of *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 329 (1971), and of other cases collected in the Reporters Note to the cited section 88 of the RESTATEMENT (SECOND) OF JUDGMENTS. There being no circumstances justifying affording the Tribe an opportunity to relitigate the issue, and the Tribe having had a full and fair opportunity to do so in *Jessie Short,* it is now bound by the former judgment.

Count II is for the same reasons as Count I barred by the doctrine of res judicata as seeking to relitigate a claim formerly determined.

Jurisdiction—in District Court or Court of Claims—of Counts I and II

Both counts I and II are demands for the payment of money. In count I the Tribe "requests the court to declare" that the sequestered proceeds be "distributed to plaintiff forthwith" and that future proceeds be "distributed solely" to plaintiff. Count II asks for a "judgment mandating defendants to restore the assets of plaintiff's trust which have been taken." The complained-of takings and diversions were done by officers of the United States, acting as such, in their official capacities, with respect to money held in the Treasury of the United States. A claim that such defendants pay out such money from the Treasury is obviously not a claim against the officers personally but a claim against the United States for the sums involved. Exclusive jurisdiction of such claims in excess of $10,000 is lodged in the Court of Claims, under sections 1491 and 1346(a)(2) of Title 28 U.S.C.

It is true, as plaintiff Tribe often repeats, that the Court of Claims has no jurisdiction of suits for injunctions or declaratory judgments. *United States v. Jones,* 131 U.S. 1

(1889); *United States v. King,* 395 U.S. 1 (1969). But a suit for money of the United States, over which the Court of Claims has exclusive jurisdiction, cannot be converted into a suit for injunctive relief, over which the Court of Claims has no jurisdiction, merely by naming a Government officer as defendant and praying for an injunction that the money of the United States, in its Treasury, be paid by the named defendant. A Congressional grant of exclusive jurisdiction cannot be so easily circumvented.

The complaint in plaintiff's case is surely one against the United States, for money, by the test laid down in *Land v. Dollar,* 330 U.S. 731 (1947): that the suit is against the sovereign (and not its officers) if "the judgment sought would expend itself on the public treasury or domain * * *". 330 U.S. at 738, *quoted with approval in Dugan v. Rank,* 372 U.S. 609, 620 (1963). Since the Treasury would be the source of the money which would pass, were plaintiff to have the injunctive relief it seeks, the action is thus one for money against the United States.

Plaintiff would have it that the money here involved is not Government money but Indian money, held by the United States for Indians. In fact, legal title to the funds rests with the United States, which holds the money for the beneficial owners, determined to be such in the decision in *Jessie Short,* the "Indians of the Hoopa Valley Reservation."

The legal posture of Indian trust funds held in the federal Treasury was discussed by the Court of Claims in *Confederated Salish and Kootenai Tribes v. United States,* 175 Ct. Cl. 451, *cert. denied,* 385 U.S. 921 (1966). There the plaintiff Indian tribes had argued that the Government's use of their trust funds necessarily amounted to a Fifth Amendment taking of their property. The Court rejected this contention in the following passage (175 Ct. Cl. at 455):

> Even on the technical level, the flaw in this argument is that legal title to the funds on deposit in the Treasury lay in the United States. * * * The Indians' interest was, at most, that of a beneficiary, and a trustee's failure to live up to the standards imposed upon him is not a taking of title from the cestui but a breach of obligation.

The jurisdiction of this court over actions for money encompasses actions for money held by the Government for Indians, whether the relationship is called a trust, as in *Confederated Salish and Kootenai Tribes, supra,* or a holding pursuant to an implied contract, as in *Fields v. United States,* 191 Ct. Cl. 191, 423 F.2d 380 (1970). *Jessie Short* was such a case and jurisdiction was assumed. *See also Coast Indian Community v. United States,* 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapaho Tribes v. United States,* 206 Ct. Cl. 340, 512 F.2d 1390 (1975). Accordingly, the suit is against the United States for money in its Treasury, in the amount of $10 million and more. The United States is suable for such amounts of money only in the Court of Claims, and not in the district court in the form of a suit against the Secretary of the Treasury and the Director of the Bureau of Indian Affairs, as officers subject to suit in district court.

The *Land v. Dollar* test appears in the context of a decision on sovereign immunity, but the principle is directly applicable here, because a recent limited congressional waiver of sovereign immunity for suits against officers has explicitly preserved sovereign immunity to suits against officers for money damages, and thus underscored the limitations of Tucker Act jurisdiction, by which suits for sums in excess of $10,000 are committed exclusively to the Court of Claims. 28 U.S.C. §§ 1491, 1346(a) (2) (1976). The reference is to a 1976 amendment to the Administrative Procedure Act, Act of October 21, 1976, Pub. L. 94-574, § 1, 90 Stat. 2721, which added to section 10 of that Act, 5 U.S.C. § 702 (1976), this sentence:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. * * *

This enactment, coupled with the simultaneous removal of any requirement of jurisdictional amount for district court jurisdiction of federal question suits against Government officers, 28 U.S.C. § 1331(a) *as amended by* Pub. L. 94-574, § 2, 90 Stat. 2721, reinforces the division of jurisdiction between district court and Court of Claims in which the latter is given exclusive jurisdiction over money claims against the United States in excess of $10,000.

The effect of Pub. L. 94-574, for present purposes, is twofold. Sovereign immunity is waived, consent to sue is given, and jurisdiction is granted, for suits in the district courts against Government officers and agencies raising federal questions, excepting suits for money damages. *Cf. Califano* v. *Sanders,* 430 U.S. 99, 105-07 (1977) (opinion by Brennan, J.); *Fitzgerald* v. *United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir.1977). *See also* Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity,* 29 AD. LAW REV. 265 (1977). Suits against officers for money damages in the district court are not consented to; for such suits sovereign immunity still prevails. Only in the Court of Claims, in an action against the United States under the Tucker Act, is there consent to suits seeking trust monies or money held pursuant to contract, in excess of $10,000. 28 U.S.C. §§ 1491, 1346(a)(2)(1976).

The net of Pub. L. 94-574 and the Tucker Act establishes a dichotomy not unlike that in the courts of equity and law in olden days. Suits against Government officers for specific relief may now be brought in the district court, and suits for money are to be brought in the Court of Claims. This is not to say that the newly authorized suit will be successful. The amendment by Pub. L. 94-574 to section 10 of the Administrative Procedure Act concludes with the proviso that:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.
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> Pub. L. 94-574, § 1, 90 Stat. 2721.

The inhibitions on the review of Government agency action are well-known—ripeness, exhaustion of administrative remedies and the like—and the framers of Pub. L. 94-574 disclaimed all intention except to lift the bar of sovereign immunity to suits in district court against Government officers for other than money damages. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 2-5, 11-15; *reprinted in* [1976] U.S. Code Cong. & Ad. News 6121, 6122-26, 6131-36; Davis, *Sovereign Immunity Must Go,* 22 Ad. L. Rev. 383, 403-05 (1970); Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity,* 29 Ad. Law Rev. 265, 270-71 (1977). But what is important in the present case is that for injunctions and declaratory relief, the claimant against the Government must go to the district court and there sue officers; for money damages (always referring to damages in excess of $10,000), the plaintiff must go to the Court of Claims. Congress has thus reaffirmed that there is no consent to suits in district court for money damages in excess of $10,000.[2]

The division of jurisdiction between the two courts requires that the courts be careful to reject Tucker Act claims masquerading as suits for injunctive or declaratory relief. *Warner v. Cox,* 487 F.2d 1301 (5th Cir. 1974) was such a suit. There a contractor brought suit against the Secretary of the Navy seeking a reversal of an administrative determination requiring the plaintiff to repay the Navy some $55 million paid by the Navy under a contract. The district court found for the plaintiff and entered an injunction restraining the Secretary from recouping the $55 million by refusing to make further payments on the contract. The Court of Appeals reversed, finding the claim to be a suit against the United States within the exclusive jurisdiction of the Court of Claims under 28 U.S.C. § 1491.

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[2] For the sake of simplicity, no mention is made of the Federal Tort Claims Act, 28 U.S.C. § 1346 (b) (1976), or other waivers of sovereign immunity in areas such as admiralty.

Applying the test of *Land v. Dollar*, the court held that the judgment against the Secretary would expend "itself (with sensible impact) on the public treasury and [would compel] the government to pay money in advance of the time specified in its contract, money which it conceivably might never otherwise have to pay at all." 487 F.2d at 1303. In concluding that the then text of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) could not be invoked as a grant of jurisdiction for such a suit (a forecast of the decision in *Califano v. Sanders, supra*), the Court pointed out the necessity of guarding against allowing claims for money redressable in the Court of Claims to be rephrased as suits for equitable relief against Government officers (487 F.2d at 1306):

> Congress established the Court of Claims to determine claims of this type and magnitude but deliberately withheld equitable powers from it. Since the United States by reason of its nature acts only through agents, it is hard to conceive of a claim falling no matter how squarely within the Tucker Act which could not be urged to involve as well agency error subject to review under the APA. Little imagination is needed to foresee the consequences of a holding that such claims as this may be reviewed either in a court having power to grant equitable relief against the United States or in one having none. We refuse to believe that Congress intended, in enacting the APA, so to destroy the Court of Claims by implication.

In other cases, too, courts have emphasized that claims against the United States for money cannot be transformed into non-Tucker Act claims for equitable relief merely by naming officers of the United States as defendants in place of the United States and praying for declaratory or other equitable relief.[3] In *Mathis v. Laird,* 483 F.2d 943 (9th Cir. 1973), relied on by the district court in sending the present case here, the Ninth Circuit readily found that a suit for back pay by a claimant who had been separated from the Air Force was within the exclusive jurisdiction of the Court of Claims, though the complaint was cast in terms of an action for mandamus and a declaratory judgment and the Secretary of Defense was the named defendant. See also *Carter v. Seamans,* 411 F.2d 767 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1970).

Similarly, in *Myers v. United States,* 323 F.2d 580 (9th Cir. 1963), the court determined that a suit in the nature of inverse condemnation, within the exclusive jurisdiction of the Court of Claims, could not be converted into a suit for trespass, within the jurisdiction of a district court as a tort, simply by the plaintiffs' saying so. As the Court stated, "The repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act." 323 F.2d at 583.

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[3] Comparably, the administrative jurisdiction to decide claims under contracts subject only to limited judicial review for error of law or lack of substantial evidence (41 U.S.C. §§ 321-22 (1976); *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394 (1966)) cannot be avoided by couching an administratively redressable claim as a claim for breach of contract. *Morrison-Knudsen Co. v. United States,* 170 Ct. Cl. 757, 345 F.2d 833 (1965); *L. W. Foster Sportswear Co. v. United States,* 186 Ct. Cl. 499, 405 F.2d 1285 (1969).

The present suit by the Hoopa Valley Tribe is as much a suit against the United States for money as any of these cases. It is apparent from the face of the complaint that plaintiff seeks the payment of money. In the text of the count, plaintiff asks that "the sequestered proceeds be distributed to plaintiff forthwith" and that "the assets of plaintiff's trust which have been wrongfully taken" be restored; the prayer, less forthrightly, asks for a declaration that the defendants have no right to take said timber and proceeds therefrom from plaintiff at any time and for any reason. Count II asks for a judgment "mandating" the restoration of plaintiff's assets.

The relief sought would fall well within the test of *Land v. Dollar, supra,* as expending itself on the public treasury. The Secretary of the Interior sequestered 70 percent of the timber revenues in an attempt to comply with the decision of the Court in *Jessie Short.* Any judgment for the plaintiff on Counts I and II of the instant case would both "expend itself on the public treasury" and prevent the Secretary from obeying the final judgment of the Court of Claims as to who is entitled to money in the Treasury. The naming of Government officers as defendants and the prayers in Counts I and II for declaratory and injunctive relief are nothing but camouflage for a claim against the United States for money. That claim lies within the exclusive jurisdiction of the Court of Claims.

Count III—Res Judicata and Jurisdiction

Count III seeks relief alternative to Count I. Plaintiff argues that if it be declared that the Secretary's sequestration of part of the timber revenues is proper, then a different amount than 70 percent should have been sequestered. The correct percentage, it is said, should be based on the ratio, as of 1891, of the number of ancestors of the Hoopas who are members of the plaintiff Tribe to the number of ancestors of the total number of Indians who resided on the reservation "for whom defendants have now sequestered 70% of plaintiff's income." The complaint does not specify the ratio in 1891 but it is alleged to be more favorable to plaintiff Tribe than the 70-30 ratio, which "rewards procreation and denies equal protection of law."

Finally, plaintiff is content to have received 100 percent of the revenues until 1974—not the 1891 portion which it alleges is correct. The prayer is for a declaration that the 70-30 ratio be nullified and that the named defendants reallocate the formula for sequestration of timber income according to the 1891 ratio, "and that said allocation be made retroactive to June 25, 1974," when payment of 100 percent to the Hoopas ceased.

Jurisdiction. Count III seeks the distribution to the Tribe or its members of an unstated amount greater than the annual timber revenues now being distributed. If, as alleged in the complaint, a sequestration of 70 percent of revenues since 1974 has resulted in an accumulation of $10 million, then the remaining 30 percent, distributed to the Hoopas, amounted to $4,300,000 and the total or 100 percent of the revenues available was $14,300,000. Thus any increase in plaintiff's share over the present 30 percent by even 1 percent to 31 percent would mean an additional payment to plaintiff of 1 percent of $14,300,000 or $143,000. The claim in Count III is thus seen to be one for payment to plaintiff, by Government officers, from the Treasury of the United States of a sum surely greater than $10,000, alleged to be owing to the plaintiff or its members. Such a claim is of course within the exclusive jurisdiction of the Court of Claims, for the reasons stated with respect to Counts I and II.

It is relevant here to note that, as a consequence of the court's jurisdiction of the suit heard in *Jessie Short,* the court had continuing jurisdiction over the amounts to be sequestered pending the final judgment, yet to come, as to which of the 3,800 plaintiffs are entitled to participate in the annual distribution of timber revenues. The administrative decision to suspend payments to the Hoopas of the entire revenues and to sequester 70 percent of the revenues for the possibly successful plaintiffs in *Jessie Short* was action taken to comply with this court's decision on title generally, pending final decision on how much is owing to the plaintiff Yuroks. That administrative decision, if erroneous, could be challenged in the proceedings in *Jessie Short* by any of the parties to the case, under the jurisdiction granted to the court in 1972 to remand matters to executive departments or officers with proper directions: "In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491 (1973), *as amended by* Pub. L. 92-415, § 1, 86 Stat. 652.

The objective of the remand power is to provide a complete remedy. The deliberate Congressional purpose in enacting the remand statute was to make it unnecessary for the parties to go to another court, after the Court of Claims made its decision, to obtain the rights which follow from the decision. *See* S. Rep. No. 92-1066, 92d Cong. 2d Sess. (1972) 2, *reprinted in* [1972] U.S. Code Cong. & Ad. News. 3116; H.R. Rep. No. 92-1023, 92d Cong. 2d Sess. (1972) 3-4. So here, the remand power was available in this court and made it unnecessary for a party to *Jessie Short* to sue in a district court to challenge the decision to sequester 70 percent of the timber funds pending final decision. The Hoopa Valley Tribe, already a party to the *Jessie Short* case, could in this court have invoked the remand power to challenge the 70-30 percent ruling which it has challenged in the District Court in California. This further identity of the jurisdiction of this court with that which the Tribe sought to invoke by its suit in district court is additional confirmation of the exclusive jurisdiction of this court over Count III.

Res Judicata. Plaintiff is precluded by the doctrine of res judicata from seeking to raise the issues of the ratio of division of revenues between Hoopas and Yuroks, sought to be raised in Count III. In *Jessie Short* this court held that the rights in the timber revenues were the individual rights of the Indians of the Reservation; that all the revenues were to be divided by the number of Indians of the Reservation and that the resulting shares were to be those of the individual Indians, respectively. The court concluded that 22 named Indians were Indians of the Reservation. Since then, in orders dated December

3, 1976 and April 27, 1978, the court has granted summary judgment on behalf of 110 additional plaintiffs, adjudging them to be Indians of the Reservation entitled to per capita payments. Each of these plaintiffs is entitled to one share of the total shares to be determined. And as already noted, proceedings are pending on motions for summary judgment that some 3,200 plaintiffs are qualified as Indians of the Reservation, and each entitled to a share.

The Hoopa Valley Tribe has been heard at length on these matters in the proceedings in *Jessie Short*. It could have urged that if it failed in its contention that the Hoopas were entitled to 100 percent of the timber revenues, then the division as between *Jessie Short* plaintiffs and the Hoopas should be, not by the number of individual Indians of the Reservation, including Yurok plaintiffs and Hoopas, but by some ratio of the two groups as of some date in the past. It chose not to so argue. Now, several years later, any effort so to reargue the issue—the division of shares between Yurok and Hoopas, per capita or in gross, as of the present or the past—contravenes the doctrine of res judicata. The claim, and the issue, have been determined, and relitigation is precluded.

The contention of an appropriate ratio as between Indians of the Square and Indians of areas added in 1891, also, renews the argument of the Tribe, rejected in *Jessie Short,* that the Addition and the Square are separate entities to be treated separately. *Jessie Short* decided that the reservation was a single, integrated reservation, all of whose inhabitants were to be treated equally and indistinguishably. While the idea of a ratio between the two groups as of 1891 was not mentioned in the briefing in *Jessie Short,* the issue of the division between Yuroks and Hoopas as occupants of separate areas was raised and rejected. It is now too late to relitigate the claim.

Count III, too, is to be dismissed, together with Counts I and II, as barred by the doctrine of res judicata.

Petitioner's Reply Brief

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No. 81-1371

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

HOOPA VALLEY TRIBE OF INDIANS,
Petitioner,
v.
JESSIE SHORT, *et al.*,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

I. RESPONDENTS ADMIT THAT THE COURT OF CLAIMS DECISION WILL EFFECTIVELY "TERMINATE" THE HOOPA VALLEY TRIBE. THAT CONSEQUENCE IS SO SEVERE THAT THE LOWER COURT'S DECISION SHOULD BE REVIEWED BY THIS COURT 1

II. THE DECISION OF THE COURT OF CLAIMS IS HINGED ON A FUNDAMENTAL ERROR OF LAW, NOT UPON THE COURT'S FINDINGS OF FACT 4

III. THE DECISION OF THE COURT OF CLAIMS HAS CREATED A GORDIAN KNOT WHICH ONLY THIS COURT CAN SEVER 7

APPENDIX J—Decision of U.S. District Court in *Puzz v. U.S. Dept. of Interior* J1

TABLE OF AUTHORITIES

Cases Page

Appawora v. Brough, 553 P.2d 934 (Utah S.Ct. 1976), *vacated,* 431 U.S. 901 (1977) 3
Bryan v. Itasca County, 426 U.S. 373 (1976) 3, 4, 6
Cherokee Nation v. United States, 40 Ct. Cl. 252 (1905) 7
DeCoteau v. District Court, 420 U.S. 425 (1975) 3
Mattz v. Arnett, 412 U.S. 481 (1973) 3, 6
Merrion v. Jicarilla Apache Tribe, —— U.S. —— (1/25/82) 3, 4
Menominee Tribe v. United States, 391 U.S. 404 (1968) 3
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 5
Morton v. Mancari, 417 U.S. 535 (1974) 5
Puzz v. United States Department of Interior, N.D. Cal., No. C80-2908 TEH 2
Rosebud Sioux Tribe v. Kneip, 430 U.S. 504 (1977) 3
Seymour v. Superintendent, 386 U.S. 351 (1962) 3
United States v. John, 437 U.S. 634 (1978) 3
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 5
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 7, 8

Statutes

25 U.S.C. § 407 7

Miscellaneous Authorities

46 Fed. Reg. 35360 (July 8, 1981) 5

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

I. RESPONDENTS ADMIT THAT THE COURT OF CLAIMS' DECISION WILL EFFECTIVELY "TERMINATE" THE HOOPA VALLEY TRIBE. THAT CONSEQUENCE IS SO SEVERE THAT THE LOWER COURT'S DECISION SHOULD BE REVIEWED BY THIS COURT.

In its Petition, the Hoopa Valley Tribe argued that the decision of the Court of Claims, holding that the unallotted resources of the Square belong not to the Hoopa Valley Tribe but rather to a class of individual "Indians of the Reservation," will effectively "terminate" the Hoopa Valley Tribe by removing its economic base and political authority in favor of a disparate group of individuals who numerically outnumber the members of the Tribe.

Although Respondents quarrel with the Tribe's use of the word "termination," Op. Br. at 22, they argue that "some of the results feared by the Hoopa Valley Tribe would come to pass—and rightly so." Op. Br. at 23. The consequences that Respondents foresee—discontinuance of the United States' treatment of the Square as a distinct governmental unit, discontinuance of the Hoopa Valley Tribe's management of the Square and its resources, and formation of a new tribe composed of "all Indians of the Reservation—as defined by the Court of Claims"—Op. Br. at 23, work so severe a consequence upon the Tribe that no other term will suffice. The issue is not a semantic one; the questions presented by the Petitions for Certiorari concern the very survival of the Hoopa Valley Tribe.[1]

This Court, in a whole series of decisions, has consistently granted review where basic questions concerning the continued existence of an Indian tribe or an Indian reservation were presented. *Mattz v. Arnett*, 412 U.S. 481 (1973); *United States v. John*, 437 U.S. 634 (1978) (reservation status and federal authority preserved); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 504 (1977) (clear intention to diminish reservation demonstrated); *Appawora v. Brough*, 553 P.2d 934 (Utah S. Ct. 1976) (tribal governmental powers terminated by opening of reservation to settlement), *vacated and remanded* to reconsider in light of *Rosebud Sioux Tribe v. Kneip, supra*, 431 U.S. 901 (1977); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (passage of Public Law 83-280 did not disestablish reservation Indian tax immunities); *De Coteau v. District Court*, 420 U.S. 425 (1975) (facts clearly showed intent that cession and sale agreement diminish reservation); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (Termination Act did not abolish the tribe or its fishing and hunting rights); *Seymour v. Superintendent*, 386 U.S. 351 (1962) (sale of surplus land did not disestablish Indian reservation). *Cf. Merrion v. Jicarilla Apache Tribe*, —— U.S. ——, 50 U.S.L. 4169, 4171-72 (Jan. 25, 1982). Because the issue here concerns the very survival of an Indian tribe, review should be granted.

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[1] The suit to terminate the legal authority of the Hoopa Valley Tribe brought in the United States District Court for the Northern District of California, *Puzz v. United States Department of Interior*, No. C80-2908 TEH, discussed in the Petition at 2, n.3, is proceeding apace. On February 26, 1982 District Court Judge Henderson entered an order denying the motion of the Hoopa Valley Tribe to dismiss the suit. A copy of the district court's decision is attached as Appendix J, *infra*. The court noted that the question posed for decision by the complaint was "whether the Congress intended to create a Reservation for individual Indians or for tribes of Indians," App. J3, *infra*, and noted that if the evidence establishes that the Hoopa Valley Reservation was intended to be administered for individual Indians, recognition of the Hoopa Valley Tribe by the United States would be an *ultra vires* act subject to judicial correction. App. J3, *infra*.

The court stayed further proceedings on plaintiffs' motion for summary judgment pending the proceedings before this Court on the Petitions. The court noted, however, that the Court of Claims' decision in *Short* would have collateral estoppel effect in the District Court. It appears, therefore, that if this Court denies certiorari, the worst fears of the Hoopa Valley Tribe may be realized. Of course, before the *Puzz* litigation even reaches the appellate stage, the Court of Claims will have irrevocably disbursed the funds and brought about the termination of the Hoopa Valley Tribe's governmental authority, unless pretermitted by this Court.

Respondents also concede that the decision of the Court of Claims is in conflict with contemporary federal Indian policy, but dismiss that conflict by arguing that interpretations of statutes and executive orders "cannot be influenced by the particular Indian policy in vogue at the time the Court's judgment is rendered." Op. Br. at 22. While Respondents correctly point out that federal Indian policy has wavered at times between individual assimilation and tribal self-determination, they attempt to defend the decision below by arguing that "[t]he policy of 'individualization of Indian ownership and control' . . . had a renaissance as recently as the 1950's in a series of 'termination acts' which typically provided for communally held reservation lands or the proceeds of their sale to be distributed to individual Indians." Op. Br. at 22. Respondents' argument is perfectly in keeping with the letter and spirit of the Court of Claims' decision, for the decision is indeed an anachronism. The critical point is that the "renaissance" of the termination policy was a nine-year aberration from a policy followed since 1934. It has since been unequivocally rejected by Congress and the courts in favor of contemporary policies strengthening tribal government and assiduously protecting tribal rights. *See* Petition at 22-23. *See also Merrion v. Jicarilla Apache Tribe, supra.*

Further, the 1864 statute authorizing the creation of the Reservation, and the contemporaneous "treaty" laying out the Square were not born in a termination era.[2] And as this Court declared in *Bryan v. Itasca County*, 426 U.S. 373, 389 n.14 (1976), even termination-era statutes (such as Public Law 83-280) should be interpreted in light of contemporary congressional policies, not those long since discarded by Congress. In light of the Nation's strong commitment to tribal self-determination, it is doubtful that Congress will ever sanction a return to termination-era policies. This Court has taken pains to uphold the termination of an Indian tribe or an Indian reservation only upon the clearest expression of such intention by Congress. *See* cases cited p. 3 *supra.* The decision of the Court of Claims flatly contradicts this contemporary approach and should be reviewed by this Court.

II. THE DECISION OF THE COURT OF CLAIMS IS HINGED ON A FUNDAMENTAL ERROR OF LAW, NOT UPON THE COURT'S FINDINGS OF FACT.

Contrary to Respondents' assertion, the holding of the Court of Claims simply does not turn on the Trial Commissioner's findings of fact.[3] Instead, the basis for the

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[2] Indeed, the statute supports the President's authority to set aside the Square for the tribes and individuals who complied with the 1864 "treaty". These are the Indians who have organized and are recognized by the federal government as the Hoopa Valley Tribe.

[3] Some of the Court of Claims findings of fact examine and reject the notion that the Hoopa Square was created solely for the benefit of *ethnic Hoopa people.* B7-8; Fdgs. 15-20, B19-25; *see*

Court of Claims' ruling was that the Hoopa Valley Tribe and the United States failed to introduce evidence to overturn the "plain and natural effect of the [executive] order . . . to create an enlarged reservation in which the Indians [of the Square] and the Indians [of the Klamath River Reservation] would have equal rights in common." App. B at 101. This termination of the Tribe's interest, the court concluded, followed because "words in an executive order . . . are to be read in their natural and ordinary sense." The court held that this "ordinary consequence" of the executive order could be overturned only by a "*compelling showing.*" App. B11 (emphasis added). The lower court decision turned entirely on its view that unless the executive order, adding certain lands to the Hoopa Square 27 years after the Reservation's establishment, explicitly stated that it was *not* intended to divest the governing tribe of its governmental power and property rights, then termination of these rights was established.

Op. Br. at 6, n.3. But these findings have no bearing on the beneficiary status of the modern Hoopa Valley Tribe which includes Indians of the Square regardless of ethnic origin. The findings demonstrate another error of law underlying the Court of Claims' decision. As this Court has unequivocally held, Indian tribes are political entities, not racial groups, and the privileges and immunities of their members are not a product of ethnic ancestry. *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 160-61 (1980), *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 479-80 (1976), *Morton v. Mancari,* 417 U.S. 535, 554 (1974). The Court of Claims' disregard of applicable decisions of this Court concerning the nature of tribes, and its failure to apprehend the difference between the use of the term "tribe" in an *ethnological* sense and use of the term in a *political* sense is error. The Hoopa Valley Tribe and the Yurok Tribe are political entities recognized by the United States, *see* 46 Fed. Reg. 35360 (July 8, 1981), not racial groups which merely assert the rights of aboriginal groups which were distinct before the reservation was created.

But it is plainly not a "natural inference" that tribal rights are terminated by general language establishing and then enlarging an Indian reservation "for Indian purposes." As this Court noted pointedly in *Mattz v. Arnett*, 412 U.S. 481, 505 (1973), and in *Bryan v. Itasca Co., supra*, federal determinations to terminate Indian rights may not be based on silence but "must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history."[4] The fundamental error of the Court of Claims was to place the burden on the Hoopa Valley Tribe and the United States to overcome by compelling evidence a *presumption* that tribal rights were terminated. The Court of Claims' analysis is 180 degrees wrong. The correct approach was endorsed by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980):

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[4] Indeed, this Court's careful construction of the relevant reservation documents in *Mattz* is inconsistent both with the Court of Claims "natural inference" conclusion and Respondents' argument that President Harrison enlarged the reservation "in order to accommodate on this reservation the numerous Indians living nearby." Opp. Br. at 7. As this Court found in *Mattz*, the 1891 Executive Order was intended to preserve the lands of the Klamath River Reservation for Yurok Indians residing there. As this Court stated:

> "In light of the passage of this last bill in the House and the presence of the *Rising Star Tea* opinions, the Indian Department moved to have the Klamath Reservation land protected for the Indians residing there. The details of this effort . . . are outlined in the Commissioner's report in *Short v. United States* . . . these efforts culminated in President Harrison's Executive Order of 1891 expanding the Hoopa Valley Reservation to include the Klamath River Reservation."

412 U.S. at 502. Not only did this Court not endorse the lower court's holding in *Short v. United States*, but this Court clearly indicated that the President's motivation in 1891 was to preserve the Klamath River Reservation. No mention was made of altering rights on the Square.

> "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

III. THE DECISION OF THE COURT OF CLAIMS HAS CREATED A GORDIAN KNOT WHICH ONLY THIS COURT CAN SEVER.

Based on its fundamental error of law, the Court of Claims has created an incredibly tangled situation on the Hoopa Valley Reservation and has placed the United States, as trustee, in an impossible situation. As pointed out in the Petition, individual ownership of unallotted reservation lands is unprecedented in federal Indian law. Contrary to Respondents' assertion, Op. Br. at 25, there is simply no species of non-tribal communal property which is federally recognized. The Court of Claims' decisions cited by Respondent, Op. Br. at 25-26, authorizing payment to individual Indians involve situations in which the relevant tribe and its lands were no longer intact, and payment of damages to individual members for past federal actions did not terminate an existing federal-tribal relationship.[5] Those decisions did not put the Court of Claims in a position where it arrogated to itself, as it now has done, the power of determining the nature and membership of an Indian tribe.

Finally, as pointed out in the Petition, because of the uncertainty of the application of federal statutes to this novel species of Indian property, the federal government is placed in an impossible position regarding management. Respondents' brief obscures this point by misquoting 25 U.S.C. § 407, the critical statute. That statute provides that the Secretary is directed to use proceeds from timber sales "for the benefit of the Indians *who are* members of the tribe or tribes concerned," not "for the benefit of the Indians *or* members of the tribe or tribes concerned," as Respondents assert. *See* Op. Br. at 27. Absence of a tribal entity, therefore, in the case of unallotted lands, removes the only statutorily-eligible beneficiary.

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[5] Further, the Cherokee treaties specifically provided for *per capita* distributions of treaty proceeds. *See Cherokee Nation v. United States*, 40 Ct. Cl. 252, 266, 277 (1905).

The legal tangle created by the Court of Claims' decision cannot be untied under the terms of the lower court's decision. Petitioner knows of no other non-tribal reservations in the country to provide precedent for the Court of Claims' determination of which individual Indians should have their ownership claims recognized.[6] As Respondents emphasize, although the litigation has gone on for 19 years the "case is essentially at the same stage it was . . . in 1974." Op. Br. at 21. Similarly, the Department of the Interior is without experience or statutory guidelines for administering such a non-tribal reservation. Only review by this Court of the underlying errors of law can remedy the situation.

Respectfully submitted,

CHARLES A. HOBBS
Attorney for Petitioner

March 5, 1982

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[6] On the other hand, if this anomalous precedent is followed elsewhere on any of the 68 similarly-situated reservations discussed in the Petition at 26-28, great upheaval of supposedly settled tribal rights will result.

Appendix

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 80-2908 TEH

LILLIAN BLAKE PUZZ, *et al.*,
Plaintiffs,
vs.
UNITED STATES DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS, *et al.*,
Defendants.

Filed Feb. 26, 1982

ORDER AND OPINION

Numerous motions of the parties came on for hearing before the Court on Monday, February 22, 1982. Having had the benefit of well written briefs and extensive oral argument, and having fully considered the positions of the respective parties, the Court is now prepared to rule on all motions currently under submission in this case. For reasons that follow,

IT IS HEREBY ORDERED that the defendants' motions to dismiss the complaint, or in the alternative for summary judgment thereon, are denied.

IT IS FURTHER ORDERED that plaintiffs' motion to add new members of the Hoopa Valley Business Council as defendants is granted.

IT IS FURTHER ORDERED that consideration of the plaintiffs' motion for summary judgment on the complaint is stayed pending resolution by the United States Supreme Court of Petitions for Certiorari to the Court of Claims currently on file with respect to opinions in the case of *Jessie Short v. United States* found at 486 F.2d 561 (1973) and at 661 F.2d 150 (1981). Additional briefing, to be submitted according to the schedule set at the close of this Order and Opinion, will be required following disposition of the Petitions for Certiorari.

One additional matter, not raised at the February 22 hearing but long under submission to the Court, is the motion by the defendants to strike plaintiffs' status conference statement of October, 1980. Though the plaintiffs' statement is inappropriate in that it addresses the merits of plaintiffs' claims, the Court can and will ignore those aspects of the status conference statement that are improper. There is no need to strike the statement from the record, though the filing of similarly inappropriate status conference statements in the future will result in the imposition of appropriate sanctions. Accordingly,

IT IS HEREBY FURTHER ORDERED that defendants' motion to strike plaintiffs' status conference statement is denied.

DISCUSSION

The complaint filed by the plaintiffs in this action raises questions concerning the structure of government on the Hoopa Valley Reservation of Northern California. The plaintiffs allege that the Reservation is one for Indians, not for tribes of Indians. Plaintiffs therefore seek an injunction prohibiting the administration of the Reservation on a tribal basis.

Defendants' motions to dismiss or for summary judgment.

The major premise underlying these motions is that the recognition of tribes for purposes of federal relations is a nonjusticiable political question. Defendants contend that, in order to prevail, the plaintiffs must prove that the Hoopa Valley Tribe is not a sovereign Indian tribe and that such determinations of tribal status are outside the judicial realm.

At least as reflected in their complaint, the claim raised by the plaintiffs does not require revocation of the sovereignty of the Hoopa Valley Tribe. Rather, the claim requires a determination of whether, under the Statute of 1864 and the 1891 Executive Order establishing the Reservation at its current boundaries, the federal government had any authority to recognize the Hoopa Valley Tribe *for purposes of administering the Hoopa Valley Reservation*. Properly viewed, the complaint thus presents questions of statutory interpretation that the courts are uniquely qualified to answer.

This does not mean that the plaintiffs' claim could never give rise to a non-justiciable political question. The question for decision posed by the complaint is whether the Congress intended to create a Reservation for individual Indians or for tribes of Indians. If, based on the evidence and applicable legal principles, a tribal reservation is found to have been intended, the case would end because, as the defendants point out, questions of the status of particular tribes are political questions that the courts ought not undertake to resolve. *Baker v. Carr*, 369 U.S. 186, 215-217 (1962). On the other hand, if the evidence establishes that the Hoopa Valley Reservation was intended to be administered by and for individual Indians, the recognition of tribes *for purposes of Reservation administration* would appear to be an *ultra vires* act on the part of the federal government and one subject to judicial correction.

The argument that the plaintiffs here lack standing because Indian resources are tribally, not individually, owned suffers from the same analytical weakness as the defendants' political question.* Whether the Statute of 1864 protects trial rights and interests rather than those of individual Indians is precisely the issue that will be resolved by this litigation. Similarly, contentions concerning the tribal nature of Reservation government raised in connection with defendants' motions to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), are questions of proof not resolvable on a motion to dismiss.

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* Without deciding its implications for this case, we note that the Court of Claims appears to have rejected a similar contention made by the defendants with respect to timber revenues in *Jessie Short v. United States*, 661 F.2d 150, 154 (*see* first two paragraphs at part II., C. of the opinion rejecting a motion to substitute the Yurok Tribe as plaintiff.

The defendants also seek dismissal under Fed. R. Civ. P. 12(b)(6) of the plaintiffs' civil rights conspiracy claim made under 42 U.S.C. § 1985(3). Viewing this claim as an alternative theory of recovery for the plaintiffs, we have determined that defendants' contentions with respect to this claim must fail. So viewed, the § 1985(3) claim is made under the Statute of 1864 for the protection of the rights of all individual Indians of the Reservation, rights allegedly protected by that Statute. If the plaintiffs establish that individual Indians are the people protected by the 1864 Statute, then the invidious classification requirement under 42 U.S.C. § 1985(3) would appear to be satisfied. *See DeSantis v. Pacific Telephone and Telegraph Co., Inc.*, 608 F.2d 327, 333 (9th Cir. 1979).

The members of the Hoopa Valley Business Council, governing body of the Hoopa Valley Tribe, seek dismissal of the complaint on the additional ground that the Hoopa Valley Tribe, which has not been named as a defendant here, is an indispensable party that is immune from suit as a sovereign entity. These defendants contend that the Tribe's sovereign immunity cannot be avoided by suing individual tribal members. The contention is without merit.

As a threshold matter, we reiterate that the very issue to be determined here is whether the Hoopa Valley Tribe can be legitimately deemed to be sovereign *for purposes of administration of the Hoopa Valley Reservation*. The position taken by the members of the Hoopa Valley Business Council that the Tribe is an indispensable party not subject to jurisdiction and therefore the case must be dismissed is tantamount to the contention that the issue raised by the plaintiffs cannot be litigated under any circumstances. In light of the foregoing discussion of the political question argument, this contention by the Business Council defendants necessarily fails.

In any event, it appears to be the law that even where the Tribe is immune from suit, its officials are not. *Santa Clara Pueblo v. Martinez*, 436 U.S. 32, 59 (1978).

Plaintiffs' motion to add new defendants.

Plaintiffs seek to add as defendants to the complaint members of the Hoopa Valley Business Council who have been elected to the Council since the complaint was filed. In light of the disposition of the indispensable party argument, it is clear that plaintiffs' motion to add new defendants should be granted.

Plaintiffs' motion for summary judgment and defendants' motion for stay.

The plaintiffs rely entirely on the Court of Claims decisions in *Jessie Short* in making their summary judgment motion, contending that the *Jessie Short* case establishes four "indisputable facts." The federal defendants, unopposed by the Business Council defendants, ask that decision on the summary judgment motion be postponed until the Supreme Court has resolved Petitions for Certiorari now pending in connection with *Jessie Short*.

We note that, in particular, the Petition for Certiorari filed by the Hoopa Valley Tribe in *Jessie Short* raises issues relevant to the administration of the Hoopa Valley Reservation and thus to the issues presented here. The importance of the issues raised by the plaintiffs' summary judgment motion is such that a decision that later might be undermined by resolution of the pending Petitions for Certiorari in *Jessie Short* would at best be ill-advised, at least where, as here, some of the issues raised by the petitioning parties are directly relevant to the instant action.

A stay of decision on the plaintiffs' summary judgment motion appears particularly appropriate in light of problems we perceive with respect to the plaintiffs' reliance on *Jessie Short*. Without deciding the summary judgment motion, we make the following observations with the expectation that the concerns reflected will be addressed by the parties in the additional briefing to be submitted once the stay hereby imposed is lifted.

First, the jurisdiction of the Court of Claims is limited to the granting of money judgments, with equitable powers confined to those incident to this limited general jurisdiction. 17 Wright and Miller, *Federal Practice and Procedure* § 4101. To the extent that the "indisputable facts" contended for by the plaintiffs concern political rights, the Court of Claims would thus appear to be powerless to find them, except to the extent that those facts are necessary to grant money damages.

A second point follows from the observation made above. Even if the Court of Claims made the findings asserted by the plaintiffs to have been made, it would seem that such findings would be limited to their relationship to what is at issue in *Jessie Short*. Without irrevocably characterizing the decisions in *Jessie Short*, we note that it appears that the issue there presented for decision concerns the distribution of shares of income from unallotted timber resources of the Reservation. It would thus appear that, for example, the second "indisputable fact" alleged by the plaintiffs, i.e., that there are no such things as tribes with vested rights on the Hoopa Valley Reservation, would be limited to a determination that there are no tribes with vested rights to the income from unallotted trust-status timber resources. What this Court would then be required to determine is the relevance of the limited Court of Claims findings to the case here.

Third, assuming that findings limited to the jurisdiction of the Court of Claims were in fact made and are relevant in this case, it is unclear which of those findings was necessary to the decision in *Jessie Short* so as to operate as collateral estoppel here. *Segal v. American Telephone & Telegraph Co., Inc.*, 606 F.2d 842, 845 (9th Cir. 1979).**

The three concerns outlined above should be addressed by the parties in their additional briefing to be submitted following resolution of the Petitions for Certiorari currently pending in *Jessie Short*. Accordingly,

IT IS HEREBY FURTHER ORDERED that following resolution of the Petitions for Certiorari filed in January, 1982, further briefs directed to the implications of the *Jessie Short* case for the plaintiffs' summary judgment motion shall be filed by each party. The briefs shall be filed by all parties at the same time and without opportunity for opposition briefing, and shall address the following questions:

(a) which of the issues actually decided in the *Jessie Short* case are relevant to or controlling in this case, and

(b) of such issues, which were necessarily decided in *Jessie Short*.

** We note the Business Council defendants argument that collateral estoppel is inapplicable here in any event because there is no final decision in the *Jessie Short* case. The argument is without merit here. Not only has the Court of Claims treated the 1973 decision as final, *see Hoopa Valley Tribe v. United States*, 596 F.2d 435 (1979), but the defendants in *Jessie Short* had and exercised ample opportunities for review of the trial judge's decision on the liability issue in that case. The Court of Claims adopted the trial judge's decision, 486 F.2d 561 (1973). Certiorari was sought and denied, 416 U.S. 961 (1974); and a rehearing on the denial of certiorari was sought and denied, 417 U.S. 959 (1974). It would thus appear that the rationale behind the finality requirement has been satisfied. *See* 18 Wright and Miller, *Federal Practice and Procedure* § 4434.

Defendants shall, by written declaration attaching a copy of the Supreme Court's decision and served on the plaintiffs, promptly inform this Court of any and all developments with respect to the Supreme Court's consideration of the Petitions for Certiorari. The additional briefing hereby required shall be filed within three weeks of service of a copy of the Supreme Court's final decision on the Petitions for Certiorari. No further oral argument will be required, and the plaintiffs' motion for summary judgment shall thereafter be deemed submitted.

/s/ Thelton E. Henderson
THELTON E. HENDERSON
United States District Judge

DATED: February 26, 1982

Amicus Brief

1

MOTION FILED
FEB 25 1982

NOS. 81-1371, 81-1373

In The
Supreme Court of the United States
October Term 1981

HOOPA VALLEY TRIBE OF INDIANS,
Petitioner,
v.
JESSIE SHORT, et al.,
Respondents.
THE UNITED STATES OF AMERICA,
Petitioner,
v.
JESSIE SHORT, et al.,
Respondents.

MOTION OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, and GILA RIVER INDIAN COMMUNITY, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONS OF HOOPA VALLEY TRIBE OF INDIANS AND THE UNITED STATES FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

AND

BRIEF OF AMICI CURIAE, THE NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, and GILA RIVER INDIAN COMMUNITY, IN SUPPORT OF PETITIONS OF HOOPA VALLEY TRIBE OF INDIANS AND THE UNITED STATES FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ABCD AT CRAFTSMAN PRESS, SEATTLE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The above enumerated Indian organizations and tribes respectfully move for leave to file a brief as *amici curiae* in support of the petitions of the Hoopa Valley Tribe of Indians (No. 81-1371, filed January 21, 1982) and the United States (No. 81-1373, filed January 21, 1982) for a writ of certiorari to the United States Court of Claims. Consent for the filing of this brief was denied by respondents.

The *amici curiae* state, in support of this Motion, that the decision of the Court of Claims in *Short v. United States*, 202 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied*, 416 U.S. 961 (1974), and the decision of the Court of Claims herein on September 23, 1981, 661 F.2d 150, are erroneous with respect to whether the Hoopa Valley Tribe is the owner of unallotted trust lands on the Hoopa Valley Reservation. The decisions of the Court of Claims are potentially damaging to all organized, federally recognized tribal entities and, in particular, to the 68 tribes occupying reservations enumerated in Appendix F of the Appendix to Petition for Writ of Certiorari filed herein by the Hoopa Valley Tribe.

In the interest of justice, the *amici curiae* respectfully request that the Court grant this Motion.

MARKS, SHEA & WILKS
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TABLE OF CONTENTS

I. Statement of Interest 1

II. Argument 2

A. The Decisions of the Court of Claims Jeopardize Numerous Reservations Throughout the United States 3

B. The Unalloted Trust Lands and Resources of a Federal Indian Reservation Are Beneficially Owned By the Federally Recognized Tribe, Not By Individual "Indians of the Reservation" 4

C. Tribal Government Cannot Co-Exist With the Rule That Tribal Resources Are the Common Property of Individuals 6

TABLES OF AUTHORITY

Table of Cases

Bryan v. Itasca County, 426 U.S. 373 (1976) 5

Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) 4

Cherokee Nation v. Journeycake, 155 U.S. 196 (1894) . . 4

Fisher v. District Court, 424 U.S. 382 (1976) 5

Merrion v. Jicarilla Apache Tribe, Nos. 80-11 and 80-15, 50 U.S.L.W. 4169 (January 25, 1982) 5

Prairie Bank of Potawotomi Indians v. United States, 143 Ct. Cl. 131 (1958), *cert. denied,* 359 U.S. 908 (1959) 4

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) . . 2,5

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 6

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 5

Statutes

25 U.S.C. § 450 *et seq.* (Indian Self-Determination and Education Assistance Act of 1975) 5

25 U.S.C. § 461 *et seq.* (Indian Reorganization Act) . . 4,6

25 U.S.C. § 1451 *et seq.* (Indian Financing Act of 1974) 5

Other Authority

F. Cohen, *Handbook of Federal Indian Law* 183 (1942) 7

Cong. Rec. S12666 (October 30, 1981) 9

House Comm. on Interior and Insular Affairs, 94th Cong. 2d Sess., *Hearings on Tribal Land Consolidation and Resource Inventory* (1976) 9

H.R. 7902, Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) 8

I *Kappler* 828 (Exec. Order of Mar. 30, 1870) 3

I *Kappler, Indian Affairs, Laws and Treaties* 815 (Exec. Order of June 25, 1876) 3

I *Kappler* 831 (Exec. Order of Oct. 3, 1878) 3

III *Kappler* 668 (Exec. Order of Oct. 23, 1911) 3

III *Kappler* 671 (Exec. Order of Mar. 22, 1911) 3

Kinney, *A Continent Lost - A Civilization Won* (1973) 8

Senate Comm. on Interior and Insular Affairs,
86th Cong. 2d Sess., *Indian Heirship*
Legal Survey Pt. 2 (Comm. Print 1960) 9

BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONS OF HOOPA VALLEY TRIBE OF INDIANS AND THE UNITED STATES FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF CLAIMS

I.

STATEMENT OF INTEREST

The National Congress of American Indians comprises approximately 375 federally recognized Indian tribes and communities and numerous individual Indian members. Among its members are most of the Indian tribes occupying the 68 Indian reservations enumerated in Appendix F of the Appendix to Petition for Writ of Certiorari [hereinafter App. F] filed by the Hoopa Valley Tribe of Indians herein. Similarly, the National Tribal Chairmen's Association comprises the elected chairmen of 128 federally recognized Indian tribes and communities in the United States, including many of the chairmen of tribes occupying the 68 reservations enumerated in App. F.

The Salt River Pima-Maricopa Indian Community and Gila River Indian Community are federally recognized Indian tribes occupying reservations enumerated in App. F.

In addition, tribes that are members of NCAI, and whose elected chairmen are members of NTCA, derive substantial revenues from unallotted tribal trust lands. As such, each is vitally interested in the decisions of the Court of Claims below holding that revenues derived from unallotted reservation trust lands may be individually owned by people who can trace their ancestry to "Indians of the Reservation" at the time of creation of the Reservation, whether those present-day owners are enrolled tribal members or not.

Finally, all *amici* are vitally interested in the decisions of the Court of Claims below because those decisions constitute a direct invasion of the heretofore recognized and recently affirmed sovereign power of American Indian tribes to determine their own membership without the interference of the federal courts. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

II.

ARGUMENT

Amici curiae submit this brief to endorse the suggestions of The Hoopa Valley Tribe and the United States that the decisions of the Court of Claims is fundamentally flawed and may constitute an ominous precedent for numerous other tribes throughout the United States. The Court of Claims erred not merely in the result it reached, but in the methodology it used to reach that result. The court's conclusion that unallotted tribal lands on the reservation are held individually, not tribally, contradicts long-standing principles concerning Indian title. Moreover, the legal reasoning utilized by the Court of Claims is completely at odds with the well-established mode of analysis used by the federal courts in Indian law cases, an analysis that is cognizant of contemporary federal Indian policy promoting tribal self-determination and self-government, that relies on well-established canons of construction governing the interpretation of treaties, statutes, and executive orders, and that gives due deference to the interpretation given by the federal agency charged with administration of Indian affairs, the Department of the Interior. This Court's analysis in Indian cases is also characterized by a restraint which defers to the policy pronouncements of the legislative and executive branches of our government. The Court of Claims, in contrast, stretched to reach a result that conflicts with contemporary federal Indian policy.

A. The Decisions of the Court of Claims Jeopardize Numerous Reservations Throughout the United States

In its 1973 decision, the Court of Claims held that neither the "Treaty" of August 16, 1864 with the Hoopas and other named tribes, 202 Ct. Cl. at 891, nor the Executive Order of June 23, 1876, I C. Kappler, *Indian Affairs, Laws and Treaties* 815, vested the Hoopa Valley Tribe with any preferential rights to unallotted lands within the Square portion of the Hoopa Valley Reservation. According to the Court of Claims, the deficiency in the quoted language from the "Treaty" and the Executive Order, is that they do not specify that the Hoopa Square be reserved as an Indian reservation *only* for the Hoopa Valley Tribe.

Were the decisions of the Court of Claims herein allowed to stand, tribal beneficial ownership of unallotted trust lands on the 68 reservations included in App. F to the Petition for Writ of Certiorari may be placed in jeopardy. For example, the Executive Order setting aside the Round Valley Reservation for the Covelo Indian Community provides that land "be set apart as an Indian reservation," without naming any specific Indian tribe. Exec. Order of Mar. 30, 1870, I *Kappler* 828. The Executive Order establishing the Tule River Indian Reservation does so "for the Tule River, King's River, Owen's River, Manche Cajon and other scattered bands of Indians in the State of California," Exec. Order of Oct. 3, 1878, I *Kappler* 831, and the Executive Orders establishing the Gila River Reservation and the Salt River Reservation, do so "for the use of the Pima and Maricopa Indians and such other Indians as the Secretary of the Interior may see fit to settle thereon." Exec. Order of Oct. 23, 1911, III *Kappler* 668; Exec. Order of Mar. 22, 1911, III *Kappler* 671.

B. The Unallotted Trust Lands and Resources of a Federal Indian Reservation Are Beneficially Owned By the Federally Recognized Tribe, Not By Individual "Indians of the Reservation."

The decisions of the Court of Claims are an unprecedented incursion into the principle that unallotted lands of a federal Indian reservation are held tribally by the federally recognized Indian tribe on the reservation, not by individual tribal members or other people somehow connected to the reservation by ancestry. As the petitions of the United States and the Hoopa Valley Tribe emphasize, federal courts have consistently held that, absent allotment, reservation property is tribal property in which individual Indians have no separate interest. *Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902); *Prairie Bank of Potawotomi Indians v. United States*, 143 Ct. Cl. 131, 143 (1958), *cert. denied*, 359 U.S. 908 (1959).

The decisions of the Court of Claims are objectionable, and command review by this Court, not only because of the error of the ultimate conclusion, but also because the legal methodology used was utterly wrongheaded and out of tune with established principles of federal Indian law. Federal Indian law is distinguished from other bodies of law both by unique substantive principles governing Indian tribes, Indian reservations, and Indian property, and by the special approach taken by the courts in resolving particular legal issues. The Court of Claims ignored the unique substantive principles and the special approach which are the hallmarks of federal Indian law.

The decisions of this Court are distinguished by the deference paid by the Court to contemporary federal policy. Since 1934, when Congress enacted the Indian Reorganization Act, 25 U.S.C. § 461 *et. seq.*, federal Indian policy has been distinguished by its focus on protecting and strengthening tribal government. Recent federal statutes have consistently endorsed the principle that tribes are free to manage and control their own economic affairs and political destinies. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq*. This Court has repeatedly emphasized that these contemporary policies should guide the federal courts when interpreting federal statutes, regulations, and executive orders. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976). As this Court recently emphasized in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980):

> Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

Even more recently, in *Merrion v. Jicarilla Apache Tribe*, Nos. 80-11 and 80-15, 50 U.S.L.W. 4169 (January 25, 1982), this Court, in concluding that an Indian tribe retained its sovereign power to tax nonmembers doing business on reservation lands, strongly emphasized the traditional role of Indian tribes as sovereign governments providing "essential services" and "the advantages of a civilized society" inside their reservations. The Court also underscored the need for tribal revenues to carry out those essential governmental functions. 50 U.S.L.W. at 4171 n.5.

If allowed to stand, the decisions of the Court of Claims will surely terminate the ability of The Hoopa Valley Tribe to continue to function as the governing body of the Square. The Court of Claims' decisions simply cannot be reconciled with this Court's insistence that federal Indian law issues cannot be decided in a vacuum without consideration of contemporary federal policies.

Not only did the Court of Claims consider itself free to ignore national federal Indian policy, it also discounted the implementation of that policy by the United States on the

Hoopa Valley Reservation itself. To the *amici*, it is a dangerous precedent indeed to allow a federal court to overturn a consistent pattern of federal executive action based solely on a strained reading of general language in a federal executive order.

In effect, the Court of Claims may give disgruntled members and nonmembers of various tribes throughout the United States the tools to undermine the established governments of the reservations. The Department of the Interior has built up considerable expertise through its course of dealings with Indian tribes over the years and the interpretation of the Secretary of the Interior should not be so lightly cast aside.[1]

C. Tribal Government Cannot Co-Exist With the Rule That Tribal Resources Are the Common Property of Individuals

Contemporary federal policy "fostering tribal self-government and economic development," *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 155 (1980), is gravely threatened by the Court of Claims' decision below. Because of the vagaries of Federal economic assistance to Indian tribes, the rents and profits of tribal property have been the only secure, self-sufficient financial base for tribal governments. An Indian tribal government deprived of title to tribal property will not be able to manage its territory and raise revenue for its essential services.

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[1] As the Petitions elaborate, the executive branch has consistently treated the Square as a distinct unit subject to the governance of The Hoopa Valley Tribe. The Square portion of the Reservation was separately allotted. Separate elections were held for the Square and the Addition concerning the applicability of the Indian Reorganization Act. And the federal government approved a constitution for The Hoopa Valley Tribe recognizing it as the exclusive Indian government for the Square and limiting its jurisdiction to that portion of the Reservation.

As explained above, the lower court concluded that revenues of unallotted lands on the Hoopa Valley Reservation were "to be divided by the number of the Indians of the Reservation and the resulting shares [are] to be those of the individual Indians." App. A10, 661 F.2d 150, 156 (1981). If the court's reasoning that rents and profits from unallotted lands belong to individual Indians in sevaralty were extended to *amici*, they could be dispossessed of their resources and their financial basis for self-government could be destroyed. And, as we will show, this ruling jeopardizes not only the income stream from tribal property but also the very ability of the tribes and the United States to *manage* unallotted properties.

In practical terms, there is a great difference between a ruling that unallotted reservation lands are tribal property and a ruling that such lands are the common property of individual Indians. As Felix Cohen explained:

> The distinction between tribal ownership and tenancy in common may be clearly seen if we consider the fractional interest of an Indian in an allotment in heirship status where there are so many heirs that every member of the tribe has a fractional interest, and then consider the interest which the same Indian would have in the same land if the land belonged to the tribe. In the first case, the individual Indian is a tenant in common. He may, under certain circumstances, obtain a partition of the estate. His consent is, generally, necessary to authorize the leasing of the land. His interest in the land is transferrable, devisable, and inheritable. In the second case, his interest is legally more indirect, although economically it may be more valuable. He cannot, generally, secure partition of the tribal estate. He can act only as a voter in the leasing of tribal land. His interest in the tribal property is personal and cannot be transferred or inherited, but his heirs, if they are members of the tribe, will participate in the tribal property in their own right.

F. Cohen, *Handbook of Federal Indian Law* 183 (1942).

As Cohen suggests, the status of *allotted* land held by tenants in common is known. Though difficult, there are rules by which such lands can be managed by the heirs or the United States. But, as petitioners in this case have explained, there is no federal statutory, regulatory, or policy framework within which to administer *unallotted* lands which are the common property of individual Indians. This is a novel type of Indian property, heretofore never recognized by Congress, the Executive, or the Courts. Nevertheless, the consequences to Indian reservations of allowing the lower court decision to stand may be foreseen by examining the tenancies in common of *allotted* lands on Indian reservations—a condition known as the "fractionated heirship problem."

During the 19th century millions of acres of tribal lands were granted to individual Indians under various allotment acts. Although well-intentioned, the allotment policy was a national tragedy. Vast expanses of Indian land were lost to non-Indians through mistakes, chicanery, and bad judgment, including sale by allottees, disposal of "surplus" unallotted land, and forced sales by States and local governments for supposed tax debts.[2]

Allotments that remain in Indian ownership today typically are owned by multiple heirs as tenants in common. Since Indian people have rarely used the will-making device their property typically goes by intestate succession to the heirs as tenants in common. As the process has been repeated over generations, a geometric progression of fractionation of land interests appears.[3] Because of this fractionated ownership, the allotted lands of Indian reservations which are the common property of many individual heirs are often allowed to lie fallow. Frequently no single heir has a large enough share to justify efforts to put the land to productive use. Or the heirs may be unable to agree on use of the allotment. And, as the number of tenants in common multiply, the administrative cost of any management decision may far outweigh the potential lease value of the property.

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[2] The allotment policy and its disastrous effects on Indian tribes are detailed in Kinney, *A Continent Lost - A Civilization Won* (1973) and in hearings on H.R. 7902, Committee on Indian Affairs, 73d Cong., 2d Sess. (1934).

In 1958 the Senate Select Committee on Indian Affairs published a report on Indian land transactions which sought solutions to the fractionated heirship problem. Similarly, in 1960 the Committee published an Indian Heirship Land Survey.[4] Also, in 1976 a House Committee prepared a detailed report on Indian land consolidation and problems in management.[5] It is a cruel irony that while Congress is trying to formulate comprehensive legislation to facilitate Indian land consolidation and reduce fractionated ownership and other problems which impede the efficient use of reservation resources, the Court of Claims have ruled that some 80,000 acres of unallotted land on the Hoopa Valley Reservation is owned, not by the tribe, but by over 5,000 individuals and even possibly their heirs as tenants in common (the 3,000 plaintiffs plus the 1,600 Hoopa Valley Tribal members).

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[3] Senator DeConcini's statement in support of S.1800 provides an example of such fractionation on one allotment on the Salt River Pima-Maricopa Indian Community. That allotment of about 10 acres of land is held in common by approximately 240 individuals. If partitioned, the largest owner would hold just over 1-¼ acres. The smallest owner would hold just under 1-¼ square feet. At $2,000.00 per acre the smallest owner's interest would be worth just over $ .05. Cong. Rec. S12666 (October 30, 1981).

[4] Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Legal Survey* Pt. 2 (Comm. Print 1960).

[5] House Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess., *Hearings on Tribal Land Consolidation and Resource Inventory* (1976).

Amici urge this Court not to extend and compound the tragedies of the General Allotment Act by allowing the Court of Claims' decisions to stand. The tribal timber, grazing land, water rights, minerals, and other unallotted resources provide the only self-sufficient basis for financing tribal government. Individual tribal members have no vested right to receive distributions from tribal property until payment is authorized by the tribal governing body and approved by the United States. Unallotted property is not owned by individual tribal members, let alone nonmembers, as tenants in common. The Court of Claims' decisions contravene sound social policy and undermine the federal government's efforts to foster tribal self-government and economic development. The Petitions for Certiorari should therefore be granted.

Respectfully submitted,

MARKS, SHEA & WILKS
By: RICHARD B. WILKS

February 21, 1982

Amicus Brief

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No. **81-1371**

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

HOOPA VALLEY TRIBE OF INDIANS,
Petitioner
v.
JESSIE SHORT, et. al.,
Respondents

MOTION OF QUINAULT INDIAN NATION FOR LEAVE TO FILE AMICUS STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
AND
STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

MOTION OF QUINAULT INDIAN NATION FOR LEAVE TO FILE AMICUS STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF QUINAULT INDIAN NATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 3

REASONS FOR GRANTING THE WRIT 5

A. The Decision Below Conflicts With Consistent Rulings on the Nature of Ownership of Unallotted Reservation Land. 5

B. The Decision Below Threatens to Require that Courts Make Almost All Decisions Regarding Tribal Membership. 8

CONCLUSION 10

TABLE OF CASES

Page

The Cherokee Trust Funds, 117 U.S. 288, 308 (1886) 6

Gritts v. Fisher, 224 U.S. 640 642 (1912) 5

Halbert v. United States, 283 U.S. 753 (1931) 3

Holt v. C.I.R., 364 F.2d 38 (8th Cir. 1966) 6

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 9

Sizemore v. Bradey, 235 U.S. 441, 446-47 (1914) 5

United States v. Mazurie, 419 U.S. 544, 557 (1975) 7

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) 4

United States v. Washington, 520 F.2d 676 (9th Cir. 1975) 6

Whitefoot v. United States, 293 F.2d 658, 661-63, nn 8 and 9 (Ct. Cls. 1961) *cert. denied*, 369 U.S. 818 (1962) 6,7

OTHER AUTHORITIES

Cohen, Federal Indian Law (1942) 6

55 Interior Decision 14 (1934) 6

9 Ops. Att'y Gen'l 24 (1857) 6

25 U.S.C. §479 10

IN THE
SUPREME COURT OF THE UNITED STATES
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No.

Hoopa Valley Tribe of Indians,
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ON
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

MOTION OF QUINAULT INDIAN NATION FOR LEAVE TO FILE AMICUS STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Quinault Indian Nation moves the Court for permission to file a statement *amicus curiae* in support of the Hoopa Valley Tribe's petition for a Writ of Certiorari.

The Nation suggest this leave should be granted because the Nation can offer the Court a view of this case that illuminates the potential breadth and importance of the case to other Indian governments. This view is not fully available from the existing parties because they must, of course, concentrate their attention on the immediate facts and the effects of the case on themselves.

Permission to file this statement was requested from all parties. The United States and the Hoopa Valley Tribe, consented. Their consents have been filed with the Clerk. The Respondents' counsel said they would consider the Quinaults' request and call back with their answer, but they did not do so.

Respectfully submitted,

Carl V Ullman

Carl V. Ullman
Michael P. O'Connell
Attorneys for
Quinault Indian Nation

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No.

Hoopa Valley Tribe of Indians,
Petitioner,
v.
Jessie Short, et al.,
Respondents.

ON
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

STATEMENT OF QUINAULT INDIAN NATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I
INTEREST OF AMICUS

The Quinault Indian Nation is the governing body of the Quinault Indian Reservation. The Reservation consists of approximately 200,000 acres, which was almost completely allotted after the Supreme Court's decision in Halbert v. United States, 283 U.S. 753 (1931). Approximately 6,000 acres are now held by the United States in trust for the Quinault Nation as tribal lands. These tribal lands are used by the Quinault Indian Nation to establish tribal fishing and forestry enterprises, to provide facilities used in rehabilitating fishery and forestry resources damaged by forest harvesting activities, United States v. Washington, 384 F. Supp. 312, (W.D. Wash. 1974), and to provide housing sites for tribal members.

The Court of Claims held that a class of people, including many non-Indians, hold "aliquot" shares or "equal rights in common" to tribal lands of the Hoopa Square of the Hoopa Valley Reservation. Slip Op. at 4 and 8. This is as disruptive as a holding that all federal lands are owned in aliquot shares by the citizens of the United States, and the holding sharply conflicts with decisions of this Court and other lower courts, including prior decisions of the Court of Claims itself.

II
REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Consistent Rulings on the Nature of Ownership of Unallotted Reservation Land.

Tribal lands are owned by the tribal government itself. In Sizemore v. Bradey, 235 U.S. 441, 446-47 (1914), this Court observed:

> [T]he Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendable.

See also Gritts v. Fisher, 224 U.S. 640, 642 (1912). Nearly a century ago, this Court also said that tribal "lands belonged to the Cherokee Nation as a political body, and not to its individual members. They were held it is true for the common benefit of all Cherokees, but that does not mean that each member had an interest as a tenant in common that he could claim a pro rata proportion of the proceeds of sales made of any part of them." The Cherokee Trust Funds, 117 U.S. 288, 308 (1886).*/

Prior to the present case, the Court of Claims recognized that the "public domain" of the Cherokee Nation, analogous to "public lands" of the United States, was held by the Cherokee Nation as public property in "trust for governmental purposes and to promote the general welfare." 28 Ct. Cls. 281, 314 (1893), aff'd, 155 U.S. 167 (1894). See also Whitefoot v. United States, 293 F.2d 658, 661-63 and nn 8 and 9 (Ct. Cls. 1961), cert. denied, 369 U.S. 818 (1962).

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*/ Other authorities have reached the same conclusion: Holt v. C.I.R., 364 F.2d 38, 41 (8th Cir. 1966); United States v. Washington, 520 F.2d 676, 691 (9th Cir. 1957); 9 Ops. A.G. 24, 28 (1857); 55 Interior Decisions 14 50-53 (1934); Cohen, Federal Indian Law, 143-44, 183-87, 288 (1942).

In apparent conflict with these authorities, the decision of the Court of Claims determines that individuals hold interests in proceeds of tribal lands, and therefore in the tribal land themselves. The Court opaquely describes these interest as "aliquot". Whatever that term means, it is intended to be in derogation of tribal ownership of tribal lands. The Court of Claims' conclusion strongly suggests reliance on the discredited notion that Indian tribes are mere private, voluntary associations. Cf., United States v. Mazurie, 419 U.S. 544, 557 (1975). The disruptive effect on tribal affairs is no less severe than the effect on federal affairs of a holding that all National Forest lands are owned by each United States citizen holding an "aliquot" share.

The danger of application of aliquot ownership to other communal tribal resources is of particular concern to fishing tribes like the Quinault. Such a rule could render it impossible for the tribal government to either limit members' exploitation of the fish resource or to preserve the treaty fishing right through responsible resource management.

B. The Decision Below Threatens to Require that Courts Make Almost All Decisions Regarding Tribal Membership.

Virtually ever federally recognized Indian tribe has some membership criteria, often based on Indian blood degree or ties to the reservation community. A line must be somehow drawn between people qualified for membership and people not qualified. As a result virtually every tribe is faced with disgruntled would-be members who fall just outside the tribe's criteria. The matter of tribal membership has been scrupously left to the tribes themselves. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

The Court of Claims ruling may open the door to an era of judicial determination of tribal membership. Such a step should not be taken without review by the highest level of the judiciary because it is a significant change from the previously announced role of the courts in such matters and because the result will have a staggering effect on the stability of tribes throughout the country.

Review of the Court of Claims' activity in this field is also necessary to provide required restrictions on the class of people who are legally qualified as "Indians of the reservation," should the Court of Claims' activity in membership matters be allowed to stand. The Court of Claims has left open the possibility that all one must prove in order to so qualify is any degree of descendacy from any person who was allotted on the reservation. This would create an endless, growing and almost entirely open class of "Indians" with rights to reservation assets.[*] Literally every succeeding generation would have a new claim to a share of these assets without regard to its lack of Indian ancestry or ties to the reservation. Tribal assets would be so diluted as to be worthless in the face of thousands of descendants claiming ownership of those assets. This case should be reviewed to require that the Court of Claims adhere to reasonable restrictions on the criteria for being an "Indian of the Reservation."

CONCLUSION

The Writ of Certiorari should be granted.

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[*] The parties below are now briefing questions like whether the children of a woman with 1/64 Indian blood and no meaningful ties to the reservation are "Indians of the reservation." Cf. 25 U.S.C. §479

Respectfully submitted,

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Opposition

3

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Nos. 81-1371
81-1373

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA and the HOOPA VALLEY TRIBE,
Petitioners,

vs.

JESSIE SHORT, et al.,
Respondents.

RESPONSE TO MOTIONS FOR LEAVE TO FILE BRIEFS OF AMICI CURIAE MADE BY THE QUINAULT INDIAN NATION AND BY THE NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, and GILA RIVER INDIAN COMMUNITY

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TABLE OF CONTENTS

Page

I

Summary of why the motions should be denied 1

II

The proffered briefs of amici curiae merely repeat petitioners' legal arguments 2

III

The proposed briefs of amici curiae distort the meaning of the decisions of the Court of Claims 6

IV

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 3
Journeycake v. Cherokee Nation, 28 Ct. Cl. 281 (1893), aff'd. 155 U.S. 196 (1894) 6, 7

Constitution, Statutes

United States Constitution, Art. III 4
25 U.S.C. Section 331 5
Act of April 8, 1864, Chap. 48, 13 Stat. 39 5

Rules

Rules of the Supreme Court:
  Rule 36.1 2
  Rule 36.3 2

Orders

Executive Order of June 23, 1876, I Kapp. 815 .... 4, 5
Executive Order of October 16, 1891, I Kapp. 815 .... 4, 5

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I

SUMMARY OF WHY THE MOTIONS SHOULD BE DENIED

All of the questions of law presented by the proposed briefs of amici curiae have already been discussed at great length in petitioners' briefs. The proffered briefs also rely almost exclusively on the same authorities cited by petitioners. No new relevant facts are offered. The moving parties, therefore, are unable to comply with this Court's

Rule 36.3 which requires the motion for leave to file an *amicus curiae* brief to "set forth facts or questions of law that have not been . . . presented by the parties, and their relevancy to the disposition of the case."

The briefs also evince a lack of understanding, and in some cases a lack even of *familiarity*, with the decisions of the Court of Claims. Not only do they fail to add anything of substance to the briefing, they provide misinformation on the decisions of the court below.

Respondents refused consent to the filing of these briefs of *amici curiae*.[1] As a consequence, the motions are "not favored" (S. Ct. Rule 36.1).

Because the briefs are merely cumulative of petitioners' briefs and convey distortions of the decisions of the Court of Claims, the motions should be denied.

II

THE PROFFERED BRIEFS OF AMICI CURIAE MERELY REPEAT PETITIONERS' LEGAL ARGUMENTS

Both moving parties repeat the Hoopa Valley Tribe's argument that "Unallotted Reservation Lands Belong to Tribes, Not to Individual Indians" (HVT Pet. for Cert., pp. 24-26). The Quinault Indian Nation does so at pp. 5-8 of its brief; the National Congress of American Indians and its cohorts[2] do so at pp. 4-6 of their brief. The Indian Congress is candid in admitting that its brief merely reiterates the same points made by the petitioners. It prefaces its argument with: "As the petitions of the United States and the Hoopa Valley Tribe emphasize . . ." (I. Congr., p. 4) and finishes that same argument with: "As the Petitions elaborate . . ." (I. Congr., p. 6, n. 1).

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[1] Service of the motion and proposed brief of the National Congress of American Indians, et al. on the attorney for the majority of plaintiffs (Harold C. Faulkner) was delayed until March 3, 1982 because the papers were sent to the wrong address.

[2] The four parties joining in that motion and brief will be collectively referred to as "the Indian Congress," and references to their brief will be "I. Congr."

The argument was fallacious when made by the petitioners, it continues to be fallacious when repeated by the moving parties. The character and quality of the rights secured to the occupants of an Indian reservation depend upon the language and purpose of the congressional action by which the reservation was established (*Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949)). After an exhaustive review of the statute, the executive orders, and the history of the administration of the Hoopa Valley Reservation, the Court of Claims concluded that this particular reservation was established for those individual California Indians who chose to settle within its boundaries, and not for any specified tribes of Indians (B6-7, 11 and Fdgs. 183, 188, B101, 105).[3] The Court of Claims recognized that the unallotted lands of the Hoopa Valley Reservation are held by the United States for the *communal* benefit of all Indians of the Reservation and that each member of that community is entitled to share equally in distributions of the communal income from that property when distributions are made by the United States (Fdgs. 188-189, B105). The conclusions reached by the Court of Claims and the methods by which it reached those conclusions are legitimate and not even novel (see Opposing Brief, pp. 24-26).

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[3] "Fdg." denotes a reference to a finding of the Court of Claims in its October 1973 decision. Letter reference "B" is to the October 1973 opinion which is reproduced as Appendix B to the Hoopa Valley Tribe's Petition for Certiorari.

The Quinault Indian Nation, for its second and only other argument (Quinault, pp. 8-10), repeats the arguments of the United States that rest on the false assumption that the Court of Claims has undertaken to establish membership criteria for a so-called "Yurok Tribe" (U.S. Pet. for Cert., pp. 23-26). In making that argument the Quinault Indian Nation in effect requests this Court to determine *in the first instance* what qualifications will be required of a respondent to qualify as an Indian of the Hoopa Valley Reservation entitled to share in the income from the reservation's unallotted lands (Quinault, pp. 9-10). Of course, this Court has appellate jurisdiction and can not assume the role of the trial court as the Quinault Indian Nation requests (United States Constitution, Art. III). The Quinault argument highlights the fact that the decisions of the Court of Claims are interlocutory; the fact that so many questions remain to be resolved by the Court of Claims in itself is sufficient reason for this Court to deny certiorari (see Opposing Brief, p. 21).

The Indian Congress repeats two other arguments briefed and argued by the Hoopa Valley Tribe. Its first argument, "The Decisions of the Court of Claims Jeopardize Numerous Reservations Throughout the United States" (I. Congr., p. 3), paraphrases the Hoopa Valley Tribe's argument that "The Court of Claims' Decision Threatens At Least 68 Reservations Throughout The United States" (HVT Pet. for Cert., pp. 26-28). Respondents dealt with that contention and with the same false prediction made by the Hoopa Valley Tribe in its 1974 petition for certiorari at pages 17-20 of their Opposing Brief. The decisions of the Court of Claims turn on an interpretation of the 1864 statute and of the 1876 and 1891 executive orders which, respectively, authorized the creation of not more than four reservations in California to accommodate all of the Indians of the State, established the first boundaries of the Hoopa Valley Reservation, and enlarged the reservation. No other reservation is affected by the Court of Claims's decision in this case.

The last argument of the Indian Congress is an elaboration of the theme presented by the Hoopa Valley Tribe at pages 22-24 of its petition for certiorari. Both briefs argue that the Court of Claims ignored "contemporary federal policy 'fostering tribal self-government and economic development.'" (I. Congr. p. 6; see HVT Pet. for Cert., p. 22). Both briefs contend that the decision of the Court of Claims "furthers a policy of 'individualization' of Indian ownership and control" which was expressed in the General Allotment Act of February 8, 1887, and which, they say, has since been repudiated by Congress (HVT Pet. for Cert., pp. 22-23; see I. Congr., pp. 6-10.)[4] Again, the Indian Congress admits that it is repeating arguments already presented by both petitioners.[5] Respondents dealt with this argument at pages 21 and 22 of their Opposing Brief, noting that the questions presented by the decisions below all turn on interpretations of the Act of 1864 and the executive orders of 1876 and 1891. Since the legislation described by the Hoopa Valley Tribe and alluded to by the Indian Congress did not even remotely purport to amend or alter the beneficiaries for whom the Hoopa Valley Reservation was established, that legislation has no relevance to an interpretation of the act and executive orders involved and has no relevance to the questions presented by the decisions of the Court of Claims.

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[4] The Act of February 8, 1887, was codified as 25 U.S.C. § 331 and has not been repealed. Recent federal legislation furthering a policy of "individualization of Indian ownership and control" was described in the Opposing Brief, p. 22, n. 14.

[5] In repeating the petitioners' false argument that the Court of Claims has recognized a "novel type of Indian property," the brief unabashedly begins: "as petitioners in this case have explained . . ." (I. Congr., p. 8).

III

THE PROPOSED BRIEFS OF AMICI CURIAE DISTORT THE MEANING OF THE DECISIONS OF THE COURT OF CLAIMS

The arguments presented by the proffered *amicus* briefs are tainted throughout by serious misconceptions of what the Court of Claims has done and a lack of understanding of the history of the Hoopa Valley Reservation.

Both moving parties misunderstand the type of interest recognized by the Court of Claims as belonging to the Indians of the Hoopa Valley Reservation. The decisions of the Court of Claims mean that the unallotted lands of the Hoopa Valley Reservation are held by the United States for the *communal* benefit of all Indians of the Reservation with each individual member of that Indian community entitled to share equally in distributions of the communal income when distributions are made by the United States (Fdgs. 188-189, B105).[6] The analogies drawn by the moving parties to Indian allotments (I. Congr., pp. 8-10), to tenancies in common (I. Congr., p. 7), and to property vested in politically organized tribes (Quinault, pp. 5-8) do not apply to communal property. In *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281 (1893), aff'd. 155 U.S. 196 (1894) the Court of Claims explained what communal property is:

> "Communal property is an estate which is neither national nor individual; that is to say, where the fee is vested neither in a person, or number of persons in their own right, nor in a body corporate or politic . . . Apart from the Indian tribes communal property is with us a thing unknown . . .

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[6] The court did not hold, as the Indian Congress claims, that "unallotted tribal lands on the reservation are held individually" (I. Congr., p. 2).

> The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners." 28 Ct. Cl. at 302.

The Quinault Indian Nation misrepresents the holding of the Court of Claims in stating "the Court of Claims held that a class of people, ***including many non-Indians***" was entitled to share in the income of the unallotted lands of the reservation (Quinault, p. 4). The prerequisite to entitlement to share in the judgment is that the respondent prove that he or she is an "Indian of the reservation" (Fdg. 189, B105). By definition, therefore, non-Indians will have no rights to income from the reservation.

The Indian Congress bases its arguments on assumptions of *fact* that were rejected by the Court of Claims. For example, the brief states that the Court of Claims "overturn[ed] a consistent pattern of federal executive action" (I. Congr., p. 6) and asserts that "the executive branch has consistently treated the Square as a distinct unit subject to the governance of The Hoopa Valley Tribe" (I. Congr., p. 6, n. 1). These assertions were the contentions made by the Hoopa Valley Tribe and the United States in the trial of the case in the Court of Claims. The Court of Claims made an "exhaustive inquiry into the data" said to support the contentions (B11) and found no support for them at all (B11-13).

Both proffered *amicus* briefs fail to grasp the essential facts of the history of the Hoopa Valley Reservation—that the statute and executive orders established this particular reservation for all Indians of California who settled there, that no particular tribes *qua* tribes were the intended beneficiaries (Fdgs. 175-6, 180-1, 183; B99-101), that there were no organized tribal governments among the Indians of the Reservation until the Hoopa Valley Tribe was created in 1950 (I-13, summarizing Fdgs. 136-156, B85-92)[7] and that the Hoopa Valley Tribe was deliberately established in such a way as to exclude the majority of Indians with rights to the Reservation (Fdg. 136, B85). Both briefs seem to assume, contrary to the findings of fact by the Court of Claims, that the Hoopa Valley Tribe was a traditional tribe with a continuous history dating from before the arrival of the white settlers, that the reservation was established for that tribe, and that the respondents are strangers to the reservation or "disgruntled would-be members who fall just outside the tribe's criteria" (see Quinault, pp. 4, 7, 8; I. Congr., pp. 3, 4, 6).

What the petitioners are really arguing is that a decision of the Department of Interior which recognizes a particular collection of individuals as a tribe solely entitled to the assets of an Indian reservation cannot be judicially corrected no matter how wrong or arbitrary the department's decision. It is inconceivable that the Indian tribes of this country should want the Department of Interior to have total control, unrestrained by judicial review, to hand-pick the beneficiaries of a reservation's resources. Had *amici* fully understood the Court of Claims's decisions, they should have sought to file briefs in support of respondents.

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[7] Letter reference "I" is to the 1979 judgment of the Court of Claims in *Hoopa Valley Tribe v. United States* which is reproduced as Appendix I to respondents' Opposing Brief.

IV

CONCLUSION

For all of the reasons stated, the motions of the Quinault Indian Nation, the National Congress of American Indians, the National Tribal Chairmen's Association, the Salt River Pima-Maricopa Indian Community, and the Gila River Indian Community for leave to file briefs of *amici curiae* should be denied.

Respectfully submitted,

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